95-1668

Supreme Court, U.S.
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CASE NO. _____

THE SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1995

LAWRENCE MOORE,

Petitioner,

v.

LOCAL 569 OF THE INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS; SAN DIEGO ELECTRICAL PENSION TRUST; SAN DIEGO NATIONAL ELECTRICAL CONTRACTORS ASSOCIATION; PAUL BLACKWOOD; TOM PRIDEMORE; JAMES WESTFALL; JOE HEISLER; DICK SMITH; TERRY GODSHALK; RON COOPER; JOSEPH MANSOLILLO, et al.; FISCHBACH & MOORE, INC.,

Respondents.

PETITION FOR WRIT
OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Lawrence Moore, *Pro Se*
Box 13543
La Jolla, CA 92039-3543
Ph. (619) 452-9537

119pp

QUESTION PRESENTED FOR REVIEW

1. Can a circuit court - which dismissed his appeal from a final order (because he had not appealed from a collateral order requiring a $200,000.00 bond) and remanded to the district judge who imposed that bond for an award of attorneys fees on appeal - also dismiss an ERISA Plaintiff's appeal of the district judge's award of $46,429.75 because he couldn't post another $2,000.00 bond, especially since a $1,000.00 bond from his appeal-in-chief was still in the court's registry, ERISA Defendants were awarded only $93.72 costs for the appeal-in-chief, and the district court judge had a long history of bias, imposition of such bonds, and specious awards of fees to deny Plaintiff access to the courts?

LIST OF ALL PARTIES

Plaintiff Lawrence Moore,
and
Defendants:
San Diego Electrical Pension Trust;
San Diego Electrical Health & Welfare Trust;
International Brotherhood of Electrical Workers Local 569;
Paul Blackwood;
Tom Pridemore;
Jim Westfall;
Joe Heisler;
Wayne Lovin;
Dick Smith;
Terry Godshalk;
George England;
Ray Altmeyer;
John Simpson;
Jim Aylsworth;
Chip Wilder;
San Diego National Electrical Contractors Ass'n;
Joe Mansolillo;
Ron Cooper;
Dave Allison;
Ken Stuart;
Dave Raspolich;
Wayne Van Der Linden;
Jack Zwart;
MIke Sparks;
and Fischbach & Moore, Inc.

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This petition should be granted because the circuit court's dismissal of Plaintiff's appeal denied him access to the courts, overstepping the boundaries of accepted judicial procedure, and departing from the usual course of such judicial proceedings, by misrepresenting a "lack of prosecution," thereby joining district court attempts to harass and drain Plaintiff's financial resources by imposition of exorbitant bonds, and approving such dismissals and misrepresentations in the district court, which all conflicted with applicable decisions of this Supreme Court, and require the exercise of its powers of supervision 22

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CITATIONS TO OPINIONS BELOW

There were no opinions published below.

STATEMENT OF JURISDICTION

The circuit court's Order dismissing the appeal from an award of attorneys fees on remand was filed on January 12, 1996.

Jurisdiction was proper in the district court under 28 U.S.C. §§ 1331, 1337, 1343, 29 U.S.C. § 412, and 29 U.S.C. § 1132, *et seq*. Appellate jurisdiction was proper under 28 U.S.C. § 1291. This Court has jurisdiction to hear this matter pursuant to 29 U.S.C. § 1254 (1) and Rule 10 of the Supreme Court Rules.

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STATEMENT OF THE CASE

A. INTRODUCTION

This case grew out of D.C. # 87-0172-B, where Plaintiff won jury verdicts against Local 569 and twenty-one Union officer-Defendants for violations of Labor Management Relations Act § 301 (29 U.S.C. 185) ("LMRA") (administering their corrupt job hiring hall), Labor-Management Reporting and Disclosure Act § 101 (29 U.S.C. 411) ("LMRDA") (abuse of his rights protected therein and improper discipline), and LMRDA § 501 (29 U.S.C. 501)(stealing Union funds to buy huge golden parachute pensions for themselves), but the district court refused any injunctive or declaratory relief from Defendants' assaults and batteries on him, or to order the Union officers to return the money stolen for their pensions and for their losing defense, or to modify those pensions wrongfully inflated with the stolen Union money.[1]

Discovery in D.C. # 85-1719-B showed that salaried Union officers -- who appointed themselves trustees of Local 569's two Pension and Health Trusts covered by the Employees Retirement Income Security Act (29 U.S.C. 1132, *et seq.*) ("ERISA"), and three non-ERISA Trusts (co-sponsored by the San Diego National Electrical Contractors Ass'n ("NECA") and electrical contractor

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[1] That district judge began imposing bonds on Plaintiff in D.C. # 87-0172-B by ordering him to post a $6,846.75 bond to stay its dismissal of the Local 569 Defendants, and has refused to return that money to him even after he prevailed at trial in 1991, or since.

The judge has subsequently awarded: $2,180.00, $14,148.00 and $955.05 costs, and $6,404.21 attorneys fees against Plaintiff in D.C. # 85-1719-B (he was also the prevailing party there); two awards of $224,140.01 and $512.50 attorneys fees in D.C. # 87-0172-B; awards of $1,255.00, $2,201.00 and $46,429.75 attorneys fees, and bonds of $200,000.00, $5,000.00 (reduced to $1,000.00 after Plaintiff moved the circuit court to reconsider) and $2,000.00 in this case. Plaintiff has posted bonds totalling $10,846.75 (despite winning every case at trial, at least seven appeals and one petition for writ of certiorari), all of which were meritless and designed only to drain his financial resources.

Fischbach & Moore, Inc. ("Fischbach")) -- were all permitted to create the inflated personal Pension Trust accounts by trustees appointed by NECA (their ERISA co-fiduciaries) as the *quid pro quo* to permit contractors (including Fischbach) and NECA to also create inflated pensions for their salaried employees.

Salaried Union officers and NECA and contractors' employees also received Health Trust benefits at much cheaper flat rates than hourly-paid union electricians. The collective bargaining agreement ("CBA") between those parties specified that the only basis for payments into the Trusts was by a fixed sum deducted from each CBA third party beneficiary electrician's hourly pay.

But the Pension Trust accounts of salaried Union officers and contractors employees' were sixty-six percent higher than hourly workers and they paid fifty percent less for Health Trust benefits. Additionally, salaried contractors employees had five year vesting but hourly paid seasonal construction electricians could only vest after ten 1,000 hour years of ERISA Pension Trust participation.

The Complaint in this case (D.C. # 91-1543-B) was originally filed against those same Union officers for further violations of the LMRDA (new assaults and threats to kill Plaintiff at the first union meetings he attended after winning D.C. # 87-0172-B).

He filed an Amended Complaint adding two ERISA causes of action after the district court refused injunctive and declaratory relief (or to give those requests to the jury), and refused to modify the inflated pensions, in D.C. # 87-0172-B. Fischbach was added as a Defendant for violating the CBA and its ERISA duties by paying hundreds of unearned pension credit-hours into the Pension Trust account of its former supervisor, Defendant Smith, after he was "elected" as Local 569's business manager.[2]

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[2] Fischbach supported both Smith and the incumbent in that tainted election to ensure compliant business managers who would continue the conspiracy between it, Local 569 officers and parent I.B.E.W. officers to successfully defraud the federal government of hundreds of millions of dollars by permitting Fischbach's employees to transfer directly -- in violation of the CBA -- to puppet companies created to evade federal debarments. See pending Petition for Certiorari No. 95-1020.

Plaintiff also sued Local 569, business manager Smith and two other business managers for permitting Fischbach to pay the inflated pension credit-hours to Smith's Pension Trust account.[3]

An LMRDA § 101(a)(3) claim for wrongful implementation of an assessment of six percent of Union members' gross wages (nationally by the IBEW) for a "market recovery job targeting program" was also dismissed from the original Complaint.[4]

The ERISA causes of action were also against ERISA trustees for permitting their own and select other personal Pension Trust accounts to be inflated while Health Trust benefits were obtained through cronyism. Pension Trust trustees and administrators were sued for causing losing investments and inordinate administrative costs, and refusing to let Plaintiff see the annual Trust reports.

NECA manager Mansolillo appointed himself and contractor trustees to the ERISA Trusts, and was named as a Defendant for taking $18 Million of the ERISA Pension Trust's assets to a new

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[3] Local 569-NECA sponsored Trusts were established pursuant to CBA provisions to provide benefits for hourly paid employees. Employees approved the amounts to be deducted from hourly pay and paid into the tax-exempt Trusts at the rate of one credit-hour for each hour worked. Union officers were not covered by that CBA or entitled to receive 40 pension credit-hours per week when the salaried rate favored them over the hourly paid electricians. *Donovan v. Daugherty*, 550 F.Supp. 390 (D.C.Ala. 1982). Dick Smith was nominally an hourly-paid Fischbach supervisor, but regularly received ostensible vacation and severance pay from Fischbach for time not worked. Fischbach had admitted in D.C. # 87-0172-B that such pay consisted of huge payments of Pension Trust credit-hours into his personal Pension Trust account. Payments of such ancillary benefits into ERISA Trusts are prohibited. *Cf. Sutton v. Wierton Steel Div. of Nat. Steel Corp.*, 724 F.2d 406 (4th Cir. 1983). ERISA Trusts must be established and maintained pursuant to written instruments. *Nachwalter v. Christie*, 805 F.2d 956 (11th Cir. 1986).

[4] That job targeting program has since been ruled to be an "illegal kickback scheme." *See IBEW Local 357 v. Brock*, 68 F.3d 1194 (9th Cir. 1995); *Building & Constr. Trades, IBEW and NECA v. Reich*, 40 F.3d 1275 (D.C. Cir. 1994).

job as a "portfolio manager" for an investing firm (Mansolillo had no previous experience in that field).[5]

The causes of action for violation of Plaintiff's rights, the illegal market recovery assessments, and illegal discipline under LMRDA §§ 101 and 609 (29 U.S.C. 411, 529) were dismissed April 6, 1992. The judge cited "**a certain abstention doctrine between the courts and the running of labor unions**" and held officers' threats were "freedom of speech that's being exercised by the people at these meetings" (Appendix, pp. 37-56, at 48).

An LMRDA § 501 breach of fiduciary duty claim against two new Union officers who also stole Union funds for their personal Pension Trust accounts was dismissed. Plaintiff was given thirty days to amend that and the Seventh and Eighth ERISA Causes of Action. A claim for emotional distress from the new assaults and violations of his rights was dismissed as preempted by ERISA (it was not related to ERISA claims), as were his demands for a trial by jury and prayer for punitive damages.[6]

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[5] Those same Union and NECA officers were Training Trust trustees, and financed (and refinanced) construction of buildings for the Training Trust and providers to the Health Trust (all transactions between such parties-in-interest are prohibited by ERISA). The U.S. Department of Labor ("DOL") can approve "exemptions" after participants are noticed of the ERISA Trust's application for an exemption, and also given an opportunity to object. The DOL denied a second "refinancing" because the Training Trust had no equity in its facilities, but the trustees then got a more favorable "independent" equity survey from Mansolillo -- in his investment "manager" role -- and it was approved. Notice was never given to participants. Pension Trust records showed transactions with other parties-in-interest where exemptions were never applied for.

[6] Allegations of willful and malicious acts permit ERISA punitive damages, and jury right depends on relief prayers (there is no ERISA jury right if only equitable relief is requested). *Teamsters Local 391 v. Terry*, 110 S.Ct. 1339 (1990). Where issues are common to legal and equitable claims, jury findings are binding on trial of the equitable claim. *Beacon Theatres, Inc. v. Westover*, 79 S.Ct. 948 (1959); *GTE Sylvania, Inc. v. Continental T.V., Inc.*, 537 F.2d 980 (9th Cir. 1976).

The claim against Fischbach for inflating Defendant Smith's Pension Trust account was dismissed as barred by the statute of limitations (not true) and on grounds Plaintiff had no standing to sue under Labor Management Relations Act ("LMRA") § 302 (29 U.S.C. 186) (but he sued under § 301). Plaintiff showed that Fischbach's supervisors would get distorted pensions from the common pension fund, but the court arbitrarily stated, "There's no cause of action stated nor can one be stated." (at pp. 45-47).

An amended order also dismissed Fischbach *nunc pro tunc* from the two ERISA clauses of action by finding,

> "Although it is named as a defendant in the Seventh and Eight Causes of Action, which allege Breach of Trust Agreement and Breach of Fiduciary Duty, Plaintiff cannot state a cause of action against Fischbach & Moore since it was an employer with no fiduciary duty to the Union."

Appendix, at p. 60. Fischbach's fiduciary duty at issue was to Trust participants, but, as usual, it was protected by the judge from *bona fide* claims (See, e.g. ERISA § 3, at Appendix, p. 33, which shows clearly that Fischbach was a proper party).[7]

The Second Amended Complaint contained a First Cause of Action under LMRDA § 501 against the two new Union officers, and a Second Cause of Action which separated the claims against the Trusts into seven Counts under ERISA and LMRA § 301.

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[7] That was not the first time Fischbach had Orders reviewed without filing documents. In Case No. 87-0172-B a ruling of law that it and puppet corporations used to evade federal debarments were separate entities under the CBA was changed by a *nunc pro tunc* Order which held there were questions of "fact" whether they were one entity.

Defendants were proper ERISA, Title I § 3 parties (and ERISA also provides a remedy against nonfiduciaries for prohibited transactions). Trustees bear an unwavering duty of complete loyalty to beneficiaries to the exclusion of the interests of all other parties, and "dual loyalties" are expressly prohibited. *NLRB v. Amax*, 453 U.S. 322 (1981).

Defendants again moved to dismiss and it was scheduled for hearing on August 24, 1992. But Union officers/trustees mailed slanderous letters to all Trust participants (e.g. that Plaintiff was a racist, bigot, avowed atheist, devoid of morals) for exercising his right to sue, and quoted a statement by the district court judge on April 6, 1992 that there exists a "**certain abstention doctrine between the courts and the running of labor unions.**"

On June 27, 1992 a Union member who was in a group of the officer/trustee Defendants (all dressed in matching Union shirts) assaulted, battered and stole Plaintiff's watch from his wrist as he was standing on the steps of the Union Hall. Plaintiff moved to amend within thirty days to add new assault and battery claims against those officer/trustees, and asked the court to reconsider its dismissal of October, 1991 assault and LMRDA § 101 claims.

He also moved to add a claim against Fischbach for asking that same judge to reconsider awarding $224,140.01 in attorneys fees to it in D.C. # 87-0172-B (the Union and NECA Defendants provided for the award in their collective bargaining agreement and the judge admitted, "[The CBA]. . . specifically identifies Plaintiff -- everything except by name."), and asked the judge to reconsider its April 6, 1992 ruling that Fischbach did not breach the CBA and had no duty to Trust participants because ERISA clearly provided for a claim against such wrongdoing employers.

The judge denied motions to amend and for reconsideration on August 24, 1992, misrepresented new facts or circumstances were not alleged, **and ordered Plaintiff to pay the Defendants' attorneys' fees for opposing reconsideration**. The entire suit and discovery were stayed until the fees were paid in full.[8]

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[8] The order also denied the motion to amend to add a cause of action against Union and Fischbach Defendants for conspiring to limit Union members LMRDA § 101(a)(4) protected rights to sue them by adding a clause to their CBA which allowed the Union/NECA joint grievance committee to award attorneys fees against any member who sued them, or filed complaints with the N.L.R.B or DOL. (Appendix 75-8, 79-80).

The judge held that motion should have been brought in D.C. # 87-0172-B. Plaintiff then brought the motion in that case but the judge

Two new officers who stole Union funds were dismissed from new fiduciary duty claims, and **Local 569** was held responsible for "transmitting" money to the Trust. After protests the judge held Union officers he dismissed on April 6, 1992 were liable:

> "The Union is the victim....That trust fund is sort of an incidental beneficiary....the cause of action is against those in the Union who caused the inappropriate transfers to be made, and it would seem to me that if the Union doesn't wish to keep litigating against members of the Union, a simple way to stop it is to simply reverse those entries and get the money back into the general fund and loop this cause of action all together."

Appendix, p. 74. Plaintiff had 30 days to add officers dismissed on April 6, 1992. The judge obviously intended to stop the case.

The judge said Plaintiff's Trust claims "are totally conclusory and ambiguous and incomprehensible," and also "fails to state facts sufficient against any trust and against any trustee," and,

> "[T]here will be no further action taken in this case until the Plaintiff pays attorneys fees and costs which the court is awarding out of the Plaintiff's motion for reconsideration."

Appendix, pp. 61-78, at 68.

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sanctioned him $512.50 for bringing it there, then affirmed an award of $224,140.01 attorneys' fees to Fischbach by a tainted joint Union/ NECA committee (of the Defendants in this case), and conspired with Union and Fischbach lawyers to extort him into dropping his appeal of the judge's dismissal of Fischbach from 87-0172-B. Plaintiff appealed and that award of fees was overturned. The circuit court unilaterally changed the title (*Moore v. Fischbach & Moore, Inc.*), misrepresenting that an "arbitrator" awarded those fees. *See Moore v. IBEW Local 569*, 53 F.3d 1054 (9th Cir. 1995). He also sued the judge and lawyers.

The judge clearly understood the Second Amended Complaint and Plaintiff's motions to amend and reconsider because he stated Union officers caused the lawsuit by not repaying stolen money after they lost D.C. # 87-0172-B, and Union Defendants asked for a 60 day stay to decide "whether to follow that course of action." The judge then said,

> "Well, they've had a year . . .. I entered a declaratory relief judgment that the Union (sic) and its officers had violated their fiduciary obligation to the Union by transferring Union funds without proper appropriation."

(at p. 74). The judge stated his intent to hamstring the suit by assessing attorneys fees, costs and requiring a $200,000.00 bond,

> "Mr. Moore is going to have to pay costs and fees to the motion to reconsider. . .. It may require further hearings which may take a few days or weeks or months. . ..And furthermore, there will be no further action in this lawsuit even if those costs are paid. . .without the prior posting of a $200,000.00 bond. So it's possible that you're going to have enough time if you simply walk out of here and start doing what the Union should have done a year ago."[9]

Appendix, at p. 75. See also pp. 51-55, 66-74, 79-81.

On October 28, 1992 Plaintiff telephoned the district court for permission to lodge a Third Amended Complaint but was told he

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[9] Even in the Ninth Circuit, the propriety of a motion for leave to amend is generally determined by reference to several factors: (1) undue delay; (2) bad faith; (3) futility of amendment; (4) prejudice to the opposing party. *See Hurn v. Retirement Fund Trust of Plumbing, Heating and Piping Industry*, 648 F.2d 1252, 1254 (9th Cir. 1981) (citation omitted). None of those factors were present in this action.

could not be advised as to such a lodging. He agreed to wait for thirty days because twenty-one losing officers were still deciding whether to repay Union money the jury in D.C. 87-0172-B held they had stolen (and to modify the inflated pensions).

On November 11, 1992 Plaintiff attended a Union meeting where Defendant Pridemore read a letter to members from Trust attorneys stating that at the August 24, 1992 hearing Plaintiff,

> "was thrown summarily out of court and . . . definitely had his horse shot out from underneath him and is afoot in cavalry country."

Plaintiff was again subjected to verbal attacks and intimidation by Union officers for suing them. By November 30, 1992 those same Union officers/Pension Trust trustees still had not decided to repay the stolen Union money or modify their inflated personal Pension Trust accounts, Plaintiff filed a 70 page Third Amended Complaint -- which detailed with factual and legal specificity all causes of action -- and alternatively requested a final order.

Other trustees were named who became known to the Plaintiff (despite Defendants' refusals to permit him to inspect Trusts' annual financial reports in violation of ERISA and a promise to the court to produce that information: see pp. 37-45). He added Defendants to ERISA causes of action for blacklisting him from employment to deny him Trust benefits and named Union/Trusts' attorneys for breach of ERISA fiduciary duties by colluding with the trustees and each other to cover up their wrongdoing.

On December 1, 1992 the district court called Plaintiff and said Fischbach telephoned the court to protest filing and service of the Third Amended Complaint. Plaintiff protested the ongoing *ex parte* communications but was told Defendants would not have to answer his Third Amended Complaint. The court called again later, and asked if Plaintiff intended to pay either the attorneys fees or the $200,000.00 bond which had been assessed.

Plaintiff said he was unable to pay any such fees or post bond (that judge knew Defendants had blacklisted and deprived him of income, ERISA Trust benefits and "vested" status for years, both to curtail his dissident union activities and to make it impossible for him to sue them). The court then asked Plaintiff to swear out

a declaration that he could not or would not pay any fees or post any bond, he did so, and delivered it to the court.

The case was dismissed on December 21, 1992, by holding:

> Because plaintiff has stated that he is unable to post the necessary bond before this court is willing to permit plaintiff to pursue this lawsuit and because he has stated that he is unable to pay any amount of attorneys fees to defendants, plaintiff's ex parte application for a final order is granted and this case is dismissed in its entirety.

(See Appendix, pp. 75-77, at 77). Plaintiff tried unsuccessfully to file a Complaint since October, 1991. He amassed voluminous evidence to support allegations in his Complaints, and presented it to the district court in Declarations filed on July 27 and August 17, 1992, and on January 25, 1992.

On January 15, 1993 the judge awarded $2,201.00 attorneys fees to Fischbach for opposing reconsideration and attending a "hearing" to fix the amount. Plaintiff proved he had no notice of any hearing, none was filed with the court or entered in the civil docket, and the judge finally acknowledged he had no notice and referred the matter to the magistrate for a fees determination.

The magistrate awarded $1,255.00 total to all Defendants, and left the matter of apportionment to them. The judge then reversed the magistrate, and reinstated the $2,201.00 award for Fischbach. (Appendix, pp. 84-88).[10]

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[10] The judge did not hold that Plaintiff acted in bad faith or review arguments to determine improper purpose, evidence was not assessed to decide if his motions to reconsider had any factual foundation under "reasonableness" or "objective standards" criteria, and no inquiry was made to determine if allegations or claims were frivolous. Sanctions under 28 U.S.C. § 1927 requires a finding of bad faith. *MGIC Indem. Corp. v. Moore*, 952 F.2d 1120, 1122 (9th Cir. 1991); *West Coast Theater Corp. v. City of Portland*, 897 F.2d, at 1528 (9th Cir. 1990). F.R.Civ.P. 11 sanctions require a reasonable inquiry into "all the

Defendants then moved the court to reconsider the final Order and make it with prejudice; their motion blatantly didn't conform to Local Rules much more than did Plaintiff's similar motion (for which he had been sanctioned), but the judge rejected that point.

B. THE CASE-IN-CHIEF ON APPEAL

On appeal Plaintiff argued: claims against Union Defendants under LMRDA § 101 and for assault and against Fischbach under ERISA and for breach of contract shouldn't have been dismissed; that he should have been permitted to amend to add July, 1992 assault and battery claims, and claims against Union, NECA, and Fischbach Defendants for blacklisting him to interfere with his ERISA pension benefits; that he alleged troubling new violations of his LMRDA § 101 protected rights and assaults and battery in asking for reconsideration of dismissal of claims for assaults and violations which began October 8, 1991 (and increased in volume and intensity after the court's April 6, 1992 rulings); that he alleged new violations of LMRDA § 101 protected rights, breach of contract and conspiracy by those Union, NECA and Fischbach Defendants in asking the court to reconsider its April 6, 1992 dismissal of other breach of contract claims; that the district judge was overtly biased and fabricated grounds for awarding attorneys fees against him, and shouldn't have required payment of the fees as a condition of proceeding with unrelated LMRDA § 501 claims; and that the Defendants should have been required to answer ERISA claims without a $200.000.00 bond condition.[11]

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circumstances of a case" to determine whether allegations or claims are frivolous. *Townsend v. Holman Consulting Inc.*, 929 F.2d 1358, 1364 (9th Cir. 1990) (*en banc*), citing *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 399-_, 110 S.Ct., at 2457-59, 110 L.Ed.2d 359 (1990).

A court would necessarily abuse its discretion if it based rulings on erroneous views of the law and clearly erroneous assessments of the evidence. *Id.*, at 110 S.Ct., at 2461.

[11] Copies of Plaintiff's Appeal brief have been lodged with this Court.

The circuit court unpublished Memorandum ignored Plaintiff's appeal of dismissal of non-ERISA claims and lied that Plaintiff had voluntarily dismissed his entire case in the district court.[12]

The circuit court dismissed his appeal, holding it didn't have jurisdiction because Plaintiff did not appeal from the collateral order requiring that $200,000.00 bond to sue ERISA Defendants, held that "factors" "favor granting the Trust funds' request" to award attorneys fees, held that his complaints weren't meritorious and had been litigated in other suits, and that he "unreasonably and vexatiously" multiplied the proceedings.[13]

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[12] See the final order at p. 82, which clearly shows there was no voluntary dismissal under F.R.Civ.P. 41. The circuit court also cited six cases where the plaintiffs all signed stipulations or settlement agreements dismissing cases as authority for holding this Plaintiff had voluntarily dismissed this case, and cited a decision placing arbitrary conditions on *United States v. Procter & Gamble*, 356 U.S. 667, 78 S.Ct. 983 (1958), which permits appeals even from voluntary dismissal when dismissed as a means of expediting review of a party's claim.

[13] See Appendix pp. 89-92. Judge Farris, who wrote the Opinion, was on the panel chaired by Ninth Circuit chief judge J.C. Wallace, which denied Plaintiff's appeal from dismissal of Fischbach, Local 569, IBEW and Union officers from D.C. # 87-0172-B (for conspiracy to evade federal debarments and breach a CBA to the third-party beneficiaries' detriment) (see pending Petition for Certiorari No. 95-1020).

The unpublished Memorandum in that appeal, written by Wallace, whitewashed this district judge's overt advocacy for Fischbach at trial in D.C. # 87-0172-B. Brewster bifurcated Fischbach from the jury trial as a party and ordered Plaintiff to prove a sham issue against Local 569, would not let Defendants motive for conspiracy be mentioned or let Plaintiff object on the record, permitted Fischbach's lawyers to participate in the bifurcated Union trial and present witnesses, lead Defendants' witnesses, excluded evidence and testimony, testified for the Union, permitted misrepresentions and overt lies, stated he did not know what "objective third parties" meant, sustained all objections to cross-examination of their witnesses, would not permit their recall, or any rebuttal case, gave prejudicial jury instructions and refused to explain when the jury asked, and insulted Plaintiff before the jury.

The circuit court Memorandum misrepresented that Plaintiff had "filed complaints against the Trust Funds that raised vague and conclusory allegations lacking adequate foundation in either fact or law", that "complaints repeated allegations that had been litigated in his earlier suits" (implying non-existent earlier ERISA suits), and that he also, "unreasonably and vexatiously multiplied the proceedings in this matter" (Appendix, p. 91).

Those were mere distortions of the lower court's unsupported findings on April 6, 1992 and August 24, 1992 that: "plaintiff's allegations in these causes of action are vague, conclusory, and redundant and should be amended to clearly state the facts to which defendants must respond"; that he had "unreasonably and vexatiously multiplied proceedings in this matter"; and lies that new assaults, battery and violations of Plaintiff's LMRDA rights by Union Defendants, which began on October 8, 1991, had been "adjudicated in the prior lawsuit," adding "this is the third suit against defendants" (See Appendix, at pp. 60, 81, 59, and 81).

There was no reason to rely on those dishonest statements by the district judge, which were also not supported by any circuit court findings of fact or assessments of any evidence. Plaintiff never filed any ERISA lawsuit or claim before, there was no bad faith, no justification for staying the suit, or for requiring a $200,000.00 bond. The circuit court did not apply a sufficiently rigorous standard to review either the district court's imposition of sanctions or its refusals to require Defendants to answer the Complaints. Transcripts of district court hearings were provided on appeal (and are provided here), and clearly showed the district judge fully understood the ERISA causes of action and abused his discretion by basing his rulings on clearly erroneous views of the law and on erroneous assessments of the evidence.

The ERISA Defendants were not awarded any sanctions in district court, but the circuit court Memorandum misrepresented both that this case in district court had been voluntarily dismissed by the Plaintiff as per F.R.Civ.P. 41(a)(1), and that the district court's rulings on sanctions against Plaintiff -- which were awarded to only the non-ERISA Defendants -- also applied to ERISA Defendants on appeal. The circuit court misrepresented holdings in ERISA cases cited in the unpublished Memorandum, and remanded to the district judge to determine an award of fees

for ERISA Defendants to defend against the appeal-in-chief from dismissal of the ERISA causes of action in the case-in-chief.[14]

Defendants also didn't file a separate motion, but requested sanctions in their answering brief. That didn't satisfy FRAP 38:

> "[F.R.A.P 38] amendment requires that before a court of appeals may impose sanctions, the person to be sanctioned must have notice and an opportunity to respond.
>
> . . .
>
> A statement inserted in a party's brief that the party moves for sanctions is not sufficient notice. Requests in briefs for sanctions have become so commonplace that it is unrealistic to expect careful responses to such requests without any indication that the court is actually contemplating such measures. Only a motion, the purpose of which is to request sanctions, is sufficient."

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[14] Transcripts of district court proceedings show Plaintiff's complaints and appeal-in chief were not without merit. An appeal is frivolous if it is "wholly without merit." *Bldg. Material & D.Tr.Dr, Local 420, v. Traweek*, 867 F.2d 500 (9th Cir. 1989).

Plaintiff's conduct on appeal against Defendants in dual roles as ERISA Trusts and trustees was governed by F.R.A.P. 38, and not by Rule 11 sanctions to Defendants acting in their dual Union, NECA and contractor roles. The circuit court should not have deliberately confused the district court's rulings to pretend sanctions had been awarded to the ERISA Trust Defendants, and remanded to that same district court for more Rule 11 sanctions on the lower court record it distorted. There were no sanctions against Plaintiff based on findings that ERISA claims were brought in bad faith or were wholly without merit. "If appellants were routinely compelled to shoulder the appellees' attorney's fees, valid challenges to district court decisions would be discouraged." *Cooter & Gell v. Hartmarx Corp.*, 110 S.Ct. at 2462, *citing Webster v. Sowders*, 846 F.2d 1032, 1040 (CA5 1988) ("Appeals of district court orders should not be deterred by threats [of Rule 11 sanctions] from district judges").

See the December 1, 1994 Notes of the Advisory Committee on F.R.A.P. 38, citing *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 767 (1980) (notice in a separate motion and opportunity to respond must precede the imposition of sanctions).

Further, the Circuit Court's Memorandum erred by relying on *Perkins v. Standard Oil Co.*, 399 U.S. 222 (1970) to remand to the same biased and partial district judge from which Plaintiff also appealed the earlier awards of sanctions (the district court distorted the record below to sanction Plaintiff for not attending a hearing despite the fact he had no notice of any hearing and no such notice of any hearing was ever recorded in the civil docket). *Perkins* was a case under the anti-trust Clayton Act which states a party "shall" recover reasonable attorneys fees.[15]

Since the suit was originally caused by assaults, batteries and violations of Plaintiff's LMRDA § 101 rights, and claims against the ERISA Trusts Defendants were caused by ERISA trustees the D.C. # 87-0172-B jury held stole Local 569 funds (in their dual Union officer roles) for their personal Pension Trust accounts (and were the same officers who committed the assaults, batteries and violations of his rights), it was based on reasonable inquiry, and absolute legal and factual violations of ERISA. Neither the reconsideration motions nor the appeal could be sanctioned.

The district court understood allegations in Complaints filed in this action, and acknowledged at those hearings on motions to dismiss that the self-dealing Union officers had caused this suit by not repaying Union money stolen to buy their inflated Pension Trust accounts, and by refusing to modify the accounts even after Plaintiff had successfully sued them on behalf of the Union.

Attorneys fees were awarded despite Plaintiff's good faith.

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[15] Policies underlying ERISA "simply do not rise to the level of" statutes like the Clayton Act which vindicate important public rights, and "incentives in the form of attorneys fees are, on the whole, less necessary to ensure that the statute is enforced." *Iron Workers Local No. 272 v. Bowen*, 624 F.2d, at 1264-1266 (5th Cir. 1980) (no ERISA circumstances compel findings -- even for a prevailing ERISA plaintiff -- that such discretionary attorney fees are virtually mandatory).

Plaintiff's appeal-in-chief showed the record. The circuit court Memorandum showed that it also had its own agenda.[16]

C. THE ATTORNEYS FEES ON REMAND

On remand to the same district court judge the situation had worsened for Plaintiff, who managed to have that judge recused from a suit against Union, NECA and Fischbach Defendants and their lawyers for conspiring to violate his LMRDA § 101 rights to sue them by making the award of $224,140.01 attorneys fees against him (the judge also conspired with them to make that award, but he had jurisdiction to do so), and from another suit against the judge and Union and Fischbach lawyers for wrongful seizure of Plaintiff's property (without jurisdiction), conspiracy and fraud. But what had been merely bias and partiality for the Defendants prior to Plaintiff's appeal of Fischbach's dismissal from D.C. # 87-0172-B was now open hostility against Plaintiff, and the judge refused to recuse with intent to punish him.

On October 3, 1994 ERISA Defendants' motion for attorneys fees on appeal came on for hearing (Appendix, pp. 93-102). The Plaintiff objected to the judge hearing any matter concerning him

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[16] Plaintiff's appeal from the district judge's abuses of the law in D.C. # 87-0172-B had been denied in an unpublished memorandum by a panel which included the author of the unpublished memorandum in the appeal-in chief here.

Case No. 87-0172-B against Union and Fischbach Defendants for successfully conspiring to evade debarments and defraud hundreds of $millions$ from the Federal Government by transfers of employees to puppet corporations newly-created by New York corporation Fischbach was subverted prior to trial by district judge Brewster after Plaintiff defeated **five series of motions** for summary judgment and dismissal.

Ninth Circuit chief judge J.C. Wallace authored the memorandum in Plaintiff's appeal from D.C. # 87-0172-B (it was strikingly similar to the one filed in this case for abuses of the law and facts), Wallace and Brewster both sit in San Diego, and their close associations with Ed Meese (convicted for another New York corporation's hundreds of millions of dollars fraud on the Federal Goverment) are published.

and moved him to recuse (at p. 93). The judge admitted Plaintiff had sued him but disingenuously stated, "I recuse on new cases, but on the cases that are already before the Court, there's no reason for the court to recuse itself" (Appendix, pp. 93-94).

Plaintiff's motions to recuse that district judge became more strident as the judge's abuses of the law and facts to punish him for not acquiescing to attempts to whitewash criminal activities of Union, NECA and Fischbach Defendants and their lawyers.

The judge disbursed Plaintiff's $1,000.00 bond (posted for costs on appeal) to Defendants (at 95-96), over the Plaintiff's objections he had no jurisdiction over the money, accepted the Defendants lawyers' billing statements despite plain mathematical errors and refusals to certify them as true and correct, "add[ed] to that sum the cost with regard to the preparation of this motion and for attending the hearing this morning," asked "[A]re those sums that the clients, the trust funds, have been billed for these services?" and after lawyers responded "Absolutely, your honor," told them to submit an order for his signature (at pp. 97-99).[17]

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[17] ERISA Trust Defendants moved for $44,586.00 in attorneys fees ostensibly incurred on appeal, and $1,843.75 for bringing the motion, for a total of $46,429.75 attorneys fees. But the billing statements presented contained mostly entries for other cases, mostly hours not related to the appeal, and entries with mathematical errors.

Further, the billing hours requested represented the lawyers' appeal on behalf of all Union and NECA Defendants, as well as ERISA Trust Defendants, and Plaintiff identified only twenty-nine of the Billing statement entries totalling $12,056.20 (including errors) which could even remotely be related to their answering appeal brief. Two and two thirds of the answering brief's arguments did not concern the ERISA Trusts, and the remaining arguments applied to all thirty of the Defendants collectively, only two of which were ERISA Trusts.

Finally, Defendants' answering brief was confined to attempts to distort the record by arguing Plaintiff had voluntarily dismissed his Complaint, and did not cite even one case related to the ERISA Trusts (except for an inappropriate cite to support their request for attorneys fees on appeal), despite thousands of dollars for "research" that should be known to any practitioners in that area of the law.

The judge also threatened Plaintiff with more sanctions:

> "I just want to say this. If Mr. Moore does appeal the amount of the award, obviously he runs the risk that the Court of Appeal will order costs and fees to the trust funds arising out of that appeal as well, and I'm sure Mr. Moore, if he didn't realize that before now, he has heard it from this Court now that he should be advised that that is a possibility. The Court of Appeal, if requested by the trusts, might award costs and fees to the trust in connection with the appeal of this Court granting attorney's fees.
>
> Now, therefore, I think that with respect to appealing the order on the judgment for attorney's fees out of the appeal -- I'm not making a determination on this, but it's possible that the Plaintiff, in order to appeal that judgment, would have to post a bond for it."

Appendix, p. 100. The threat was plainly intended to deter the Plaintiff from appealing the district judge's order that awarded further sanctions against him for appealing the dismissal of the case-in-chief, and it flew directly in the face of this Supreme Court's response to such district court threats. See *Cooter & Gell v. Hartmarx Corp*, 110 S.Ct. at 2462, and n. 14, *supra*.[18]

Plaintiff asked if the judge considered his argument that the circuit court was misled, "in that I never sued the trusts before," the judge evaded answering by stating he didn't "review the court of appeals," and stated "I'm not the Supreme Court." Plaintiff's further attempts to clarify the matter produced this dialogue:

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[18] The district judge's patron, Ninth Circuit chief judge J.C. Wallace, has previously refused to comply with the Supreme Court's decision in *Cooter & Gell v. Hartmarx*, and instead insisted on the bloated Ninth Circuit's right to abuse awards of attorneys fees to modify litigants' behavior. *Cf. Partington v. Gedan*, 914 F.2d 1349 (9th Cir. 1990).

MR. MOORE: I'm asking you two specific things. Did you, by making this award, find that I had previously sued the trusts in other cases? And did you by making this award make the finding that you found in the case against the trust that my claims against the trust[s] were frivolous and vexatious?

MR. KISSANE: Unless Mr. Moore has noticed your deposition your Honor, I would request that you limit your comments so that he doesn't have more of a record to bring up.

THE COURT: I think I've covered the issues that are before me this morning. So that will conclude the matter.

See Appendix, at pp. 101-102.

D. THE ATTORNEYS FEES ON APPEAL

The district judge awarded Defendants the entire amount of $46,429.75 (without clarifying that $1,843.75 was not ordered by the circuit court), paid Defendants' award of $93.72 costs from Plaintiff's existing $1,000.00 costs bond, and stayed disbursal of the remaining money until February 6, 1995 (Appendix, at 103).

Plaintiff filed notice of Appeal No. 95-55046, the Defendants asked for another costs bond in his appeal from the attorneys fees award and on February 16, 1995 the judge acknowledged the rest of Plaintiff's $1,000.00 bond was still deposited with the court. No Opposition to the request was allowed, but the judge ordered a new $2,000.00 bond, and stated he would disburse the existing bond "in partial payment of the Trust Defendants' attorneys' fees incurred on the appeal for which the $1,000.00 was posted."

The district judge's Order also stated, "the Court hereby ORDERS that Moore's appeal of this matter is stayed until such a bond is posted with the Court. (Appendix, at p. 105).[19]

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[19] Plaintiff filed an appeal from imposition of that $2,000.00 bond.

On March 9, 1995 the judge filed another order stating the Trust Defendants "are entitled to the remainder of the $1,000.00 bond which was posted to secure their costs as part satisfaction of their judgment for attorneys' fees on appeal" (Appendix, 107).

Plaintiff filed Objections to the February 16, 1995 Order and moved the circuit court to stay the briefing schedule until the district judge acted, the stay was granted, Plaintiff later moved to re-establish the briefing schedule, he was required to file his opening brief and excerpts of record by October 30, 1995, and he complied with his duties under that Order (Appendix, 108-9).

Defendants did not file an answering brief, but moved instead to vacate that briefing schedule, or alternatively for an extension of time to answer, and briefing was stayed "pending resolution of appellees' motion to vacate the briefing schedule" (Appx).

On December 8, 1995 the circuit court, through judge Sneed, found the district court had no jurisdiction to stay an appeal, acted on Defendants' "motion for reconsideration" of the briefing schedule, denied that, *sua sponte* ordered Plaintiff to post the new $2,000.00 bond (ignoring a separate appeal from imposition of that new bond) "or show cause why this appeal should not be dismissed for lack of prosecution," set a briefing schedule for the Plaintiff's response to the Order to show cause, and stayed the briefing schedule again (Appendix, at p. 110).[20]

Plaintiff timely filed a response to the Order to show cause by proving he had not failed to prosecute this appeal and timely met the briefing schedule on October 30, 1995, made that court aware of the new, separate appeal, the rich history of the cases, the rich history of judicial bias and actions "designed to harass or drain the financial resources" of Plaintiff (in violation of the Southern District of California's own Local Rule 83.5(e.1.b.3), the fact he had a $1,000.00 bond for costs on appeal from D.C. # 91-1543-B deposited in the district court when the district judge ordered the $2,000.00 bond for costs on this appeal from the same case,

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[20] Circuit Judge Sneed's previous arbitrary dismissal of one of Plaintiff's appeals was reversed by this Court in Petition for Writ of Certiorari No. 87-24, on October 5, 1987.

the rich history of the district judge's collusion with Defendants' lawyers, the district judge's refusals to award injunctive relief against Defendants' blacklisting of Plaintiff from employment, and his inability to post any more bonds.

Plaintiff concurrently moved -- within that Response -- for a stay of the district judge's order imposing a $2,000.00 bond, and alternatively asked the circuit court to Order the Defendants to redeposit the $1,000.00 bond disbursed -- as partial payment of the attorneys fees award appealed -- with the district court Clerk or to reduce the amount of the costs bond (in light of the fact they were awarded only $93,72 costs on the appeal-in-chief and it was unlikely that this appeal's costs would exceed that amount.

On January 12, 1996 the circuit court filed an Order denying Plaintiff's request to stay the district court's order requiring him to post a $2,000.00 bond, ignored requests to have the $1,000.00 redeposited or for reduction of the $2,000.00 bond, dismissed the appeal, and foreclosed any further related motions (at p. 111).

REASONS FOR GRANTING THE WRIT

This petition should be granted because the circuit court's dismissal of Plaintiff's appeal denied him access to the courts, overstepping the boundaries of accepted judicial procedure, and departing from the usual course of such judicial proceedings, by misrepresenting a "lack of prosecution," thereby joining district court attempts to harass and drain Plaintiff's financial resources by imposition of exorbitant bonds, and approving such dismissals and misrepresentations in the district court, which all conflicted with applicable decisions of this Supreme Court, and require the exercise of its powers of supervision.

The circuit court departed from the usual course of judicial proceedings by using trickery to dismiss the ERISA beneficiary's appeal, and protected thieving dual role union/contractor ERISA trustees by using trickery to have sanctions awarded against the Union member/ERISA beneficiary Plaintiff whose Union's funds were stolen by the same union officer/ERISA trustees who stole his benefits. Trickery also extended to the very administration of the ERISA trusts, via decisions which conflicted with Supreme Court's decisions on such sanctions.

The circuit court also overstepped the boundaries of accepted procedure and approved such a departure by the district court by dismissing Plaintiff's appeal and participating in approval of the unsupported sanctions, and also did so via decisions which are in conflict with Supreme Court decisions to permit appeals of such sanctions in the form of attorneys fees. By taking those actions both courts merit an exercise of this Court's supervision power.

Application of the Supreme Court precedent to the case at hand to disallow such sanctions and permit such appeals is clear and unmistakable, it was cited in both the circuit and district courts, and both courts failed to follow that precedent.

Whether the courts may approve sanctions against an ERISA Plaintiff/beneficiary who sued the corrupt joint union/contractors' association trustees who are in congenitally incestuos "dual roles" with dual loyalties is an issue of first impression for the Supreme Court, and would contribute to development of national ERISA law. The decision below to dismiss Plaintiff's appeal by trickery does not turn solely on an analysis of facts, or depend on the sufficiency of the evidence, and, in fact, the evidence and true facts mitigate against both the sanctions and dismissal.

The hearings on April 6, 1992 and August 24, 1992 showed the courts were both aware of the nature and intent of Plaintiff's Complaints filed in this action, and that Plaintiff had never sued any ERISA trust Defendants prior to this case. Plaintiff did not unreasonably or vexatiously multiply proceedings in the district court by suing ERISA Defendants who had already been found by a jury in another case to have wrongfully inflated their ERISA Pension Trust accounts. There were certainly no conclusory or vague allegations in the Complaint filed on November 30, 1992.

The district court did not assess any evidence, or even make any inquiry to determine whether Plaintiff had acted reasonably under all of the circumstances of the case. The judge made no finding of bad faith, and had personal knowledge that Plaintiff did not "unreasonably and vexatiously" multiply any proceedings because the same judge presided over the jury's decision against the Union officers/ERISA trustees in D.C. # 87-0172-B. There is certainly a "good faith argument" for Plaintiff's view of what the law is or should be.

Plaintiff's appeal was not subject to sanctions or dismissal

because it was not frivolous, and the district court couldn't award attorneys fees on appeal. *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 110 S.Ct. 2447, 110 L.Ed.2d 359 (1990). None of the three types of issues the Supreme Court has held must be considered to award sanctions were considered either by the circuit or district courts. *Id.*, at 399, 110 S.Ct., at 2457.

Although Plaintiff sorted out and clearly showed the circuit court on appeal of the $46,429.75 sanctions that its Memorandum from the original appeal misrepresented the unsupported findings in district court, the circuit court dismissed that second appeal by misrepresenting Plaintiff had failed to prosecute it.

The district court's non-judicial agenda multiplied proceedings in this case just as it had in Case No. 87-0172-B. The appeals court also resorted to trickery, and unreasonably and vexatiously multiplied proceedings by dishonestly distorting the holdings of the district court, and did so in order to justify remanding the case back to the district court for more awards of attorneys fees.

Those problems are clearly beyond the academic or episodic, and because such Trusts comprise the third largest repository of assets in the United States (behind banks and savings and loan institutions) are clearly of interest to the public. *Layne & Bowler Corp. v. Western Well Works*, 261 U.S. 387 (193); *Rice v. Sioux City Cemetery*, 349 U.S. 70 (1955).

The amounts of money involved in resolution of the conflicts underlying these issue is enormous, and many individuals are affected by the decisions below to not permit such ERISA issues to be litigated. *Commissioner v. Standard Life & Accident Ins. Co.*, 433 U.S. 148, 151 n.5 (1977); *United States v. Zazove*, 334 U.S. 602, 614-14 n.7 (1948) (issues involved billions of dollars); *Patterson v. Lamb*, 329 U.S. 539 (1947) (status of many individuals affected by decision below).

The circuit court's Memorandum departed from the usual course of judicial proceedings by distorting the comments of the district court at hearings on Plaintiff's motions to amend and to reconsider dismissal of claims dismissed on April 6, 1992, and on Union, NECA and Fischbach Defendants' motions to dismiss.

By distorting the district court's comments and the holdings in the ERISA cases cited in its Memorandum, and by taking them out of context to act under color of the law (ERISA) to remand

to the district court again for an award of sanctions against this ERISA participant/beneficiary, the circuit court overstepped the boundaries of accepted judicial procedure.[21]

But the circuit court's dismissal of Plaintiff's appeal of the district court's subsequent award of sanctions, with the comment, "This appeal is dismissed" (Appendix, 111), and the implication (false) that it was "dismissed for lack of prosecution," has both overstepped the boundaries of accepted judicial procedure and departed from the usual course of judicial proceedings, requiring the exercise of the Supreme Court's powers of supervision.

Further, given the rich history of the unsupported awards of the original sanctions in the district court, the circuit court's refusal to even acknowledge Plaintiff's appeal of those sanctions, and the outrageous, unsupported award of sanctions on remand to the district court -- all three of which conflicted with the Supreme Court's decision in *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 110 S.Ct. 2447, 110 L.Ed.2d 359 (1990) -- it is clear that the circuit court has also condoned overstepping of the boundaries of accepted judicial procedure, and departures from the usual course of judicial proceedings by the district court.[22]

Since Plaintiff had the temerity to appeal district court judge Brewster's abuses of the law and facts, and to permit the escape of Fischbach and Union conspirators (who successfully defrauded

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[21] Plaintiff is a fifty-five year old thirty-nine year electrician and apprentice who has been blacklisted from working at his trade for over thirteen years, making it impossible to achieve vested rights in the joint Union/NECA controlled ERISA Pension Trust, which he was forced to pay into from hourly wages under a collective bargaining agreement. Defendants also stole his existing Pension Trust benefits by making it impossible for him to work, because benefits are systematically eroded by "non-participation" in mandatory deductions from his hourly wages.

[22] Plaintiff also believes he can logically infer from the rich history of distortions of the law and facts, misrepresentations, and outright lies by judges in both courts, that there is collusion between certain circuit court judges and the district judge.

the federal government out of hundreds of $million$, and Local 569 electricians--including Plaintiff--out of $million$), Brewster has awarded attorneys fees against him, and given away his jury verdicts and costs awards on every occasion Plaintiff appeared before him (Plaintiff moved to recuse him on every occasion).

There is no doubt about Brewster's bias and partiality, he has admitted to it by recusing himself from D.C. ## 93-1857-K and 94-02-R, and has also admitted to a **"certain abstention doctrine between the courts and the running of labor unions."**[23]

At the October 3, 1994 hearing for attorneys fees on remand Brewster said he recuses from new cases involving Petitioner, but not from the "pending" cases, an obvious self-serving distinction.

Union and Trust in-house lawyers Kissane & Cook were among those who previously conspired with district court judge Brewster to award $224,140.01 to Fischbach in D.C. # 87-0172-B, and Brewster awarded $1,843.75 to them for bringing their request for $44,586.00 fees on remand in this case.

At the hearing when Brewster awarded $46,429.75 to Kissane & Cook, he refused to respond to Plaintiff's questions whether he found Plaintiff filed frivolous and vexatious claims against the two ERISA Trusts Defendants before (the truth, that he had not, would have negated any award based on Circuit judge Farris' unsupported Memorandum findings. Kissane urged Brewster to **"limit your comments so that [Plaintiff] doesn't have more of a record to take up [on appeal],** which Brewster then did.

By demanding an exorbitant costs bond of $2,000.00 in an

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[23] D.C. # 93-1857-K was against those Union, NECA and Fischbach conspirators, and their lawyers, who first awarded the $224,140.01 attorneys fees which Brewster affirmed, but which was vacated by the circuit court in *Moore v. IBEW Local 569, et al.*, 53 F.3d 1054 (9th Cir. 1995) (but Brewster has ignored). D.C. # 94-02-R was against Brewster and the lawyers for using that award to sieze Plaintiff's property, harass, extort and blackmail him into foregoing appeals of abuses of the law and facts in D.C. # 87-0172-B to dismiss Fischbach, Local 569 and the parent International B'hood of Electrical Workers (see pending Cross-Petition for Writ of Certiorari No. 95-1020).

appeal of a collateral award of attorneys fees, after Defendants were awarded only $93.72 in costs in the main appeal, and then disbursing an existing $1,000.00 costs bond to satisfy his abusive attorneys fees awards, district judge Brewster has deliberately interfered with Plaintiff's right of access to the federal courts to appeal this latest abusive award of sanctions, thereby permitting those Defendants, and their lawyers, to continue to notice the Plaintiff for abusive judgment debtor examinations, motions to compel answers, and for further awards of sanctions.

The right of access to the courts is basic to our system of government and is one of the fundamental rights protected by the Constitution. U.S.C.A. Const. Art. 4, §2, cl. 1; amends. 5, 14; LSA-C.C. art. 2315. The mere formal right of access to the courts does not pass constitutional muster, and the circuit court should not have distorted the record to misrepresent that the beleagured Plaintiff had failed to prosecute ~~his~~ appeal to dismiss his appeal of the contumelious sanctions.

Nor should the circuit court have continued to abuse the law and facts by misrepresenting that Plaintiff failed to prosecute his appeal of the award of sanctions on remand to dismiss it, thus interfering with Plaintiff's right of access to the federal courts.

Access to the courts is basic to our system:

> "[It] is the alternative of force. In an organized society it is the right conservative of all other rights, and lies at the foundation of orderly government . . .. granted and protected by the Federal Constitution."

Chambers v. Baltimore & Ohio Railroad, 207 U.S. at 148, 28 S.Ct. at 35, 52 L.Ed. 143 (1907) (citations omitted); *California Motor Transport Co., v. Trucking Unlimited*, 404 U.S. 508, 92 S.Ct. 609, 30 L.Ed.2d 642 (1972). Ironically, Defendants have continued to use force against Plaintiff, with impunity.

As the draftsman of the Federal Rules explained: "In final analysis, a court has the responsibility to do justice between man and man, and general principles cannot justify denial of a party's fair day in court except upon a serious showing of willful default." *Gill v. Stolow*, 240 F.2d 669, 670 (2nd Cir. 1957).

The right of access must be adequate, effective and meaningful. *Cf. Ryland v. Shapiro*, 708 F.2d 967, 972 (5th Cir. 1983), *citing Wolff v. McDonnell*, 418 U.S. 539, 94 S.Ct. 2963, 41 L.Ed.2d 935 (1974); *Bounds v. Smith*, 430 U.S. 817, 97 S.Ct. 1491, 52 L.Ed.2d 72 (1977); *Boddie v. Connecticut*, 401 U.S. 371, 91 S.Ct. 780, 28 L.Ed.2d 113 (1971).

The circuit court's December 9, 1995 and January 12, 1996 Orders dismissing his appeal disguised the true fact that both the district and circuit courts believed their long-time harassment to drain Plaintiff's financial resources had finally reached fruition, and that the appeal was dismissed because of his inability to post the unnecessarily exorbitant $2,000.00 bond.

There was no doubt the district judge was biased and partial for Defendants, and protected them from damages by conspiring with their attorneys to commit unethical acts. He refused to recuse to deliberately deny Plaintiff access to the courts.

Judgments, including the $46,429.75 award of attorneys fees, are not final under Federal or California law when appealed, and the circuit court or this Court can stay the bond, where, as here, Plaintiff can demonstrate a reasonable liklihood of success on the appeal of this first time ever award of attorneys fees against an ERISA beneficiary who sued wrongdoing ERISA trustees.

"Final money judgment" under the Federal Rules and in the State of California means after any appeal is also final (See, e.g., Cal.CodeCiv.Procedure 700.190. Clearly, the extraordinary circumstances Plaintiff is faced with here justify a stay of the ostensible bond for costs on appeal. *Trans World Airlines v. Hughes*, 314 F.Supp. 94, 96(S.D.N.Y. 1970), *aff'd* 449 F.2d 51(2d Cir. 1971), *rev'd on other grounds*, 409 U.S. 363, 93 S.Ct. 647, 34 L.Ed.2d 557 (1973) (court has the inherent power in extraordinary circumstances to provide for the form and security for even a stay of execution on judgment in a pending appeal, based on the conditions it finds in a particular case).

Neither the circuit court nor the district court may continue imposing bonds on Plaintiff to deny him access to the courts. While it is normal to seek a costs bond for security on appeal under F.R.A.P. 7 first in the district court, that Rule does not grant Brewster jurisdiction to continue his vendetta against Plaintiff, especially since he should not have dispersed the

$1,000.00 costs bond as part payment of the $46,429.75 attorney fees award (which is the subject matter of the pending appeal) because it misrepresents the purpose and true nature of such a costs bond. [A] bond for costs on appeal covers costs, and not attorneys fees. 9 *J. Moore & B. Ward, Moore's Federal Practice* ¶ 207.06 (2d ed. 1985, *citing City of New York v. Slayne*, 1 FRD 742, 4 FR Serv 73f.21 (ED NY 1941); 16 C. Wright, A. Miller, E. Cooper & E. Gressman, Federal Practice and Procedure § 3953, at 379 (1977).

Costs referred to in F.R.A.P. 7 are those that may be taxed against unsuccessful litigants under FRAP 39, and do not include attorneys fees that may be assessed on appeal. *In Re American President Lines, Inc.*, 779 F.2d, 714, 716 (D.C. Cir. 1985) (the bond on appeal was set aside even after appellant failed to satisfy a Bankruptcy Court's judgment for attorneys fees, and the Court further said "the appeal likely would be found to be frivolous and [appellee] thus would qualify for costs"); *Fleischman Distilling Corp. v. Maier Brewing Co.*, 386 U.S. 714, 720, 87 S.Ct. 1404, 1408, 18 L.Ed.2d 475, 480 (1967).

The Court of Appeals reassessed the size of the bond:

> Moreover, the challenged bond fails as a legitimate means of protecting [appellee] against the possibility that [appellant's] appeal might turn out to be frivolous. The traditional countermeasure for an appeal thought to be frivolous is a motion in the appellate court to dismiss, which is available at the outset of the appeal and before expenses thereon begin to mount. Additionally, a monetary remedy is afforded by Federal Appellate Rule 38, which authorizes an assessment of damages and single or double costs, including reasonable attorneys fees . . . . It is, however, for the court of appeals, not the district court, to decide whether Rule 38 costs and damages should be allowed in any given case.

Id., at 717;

Plaintiff has a right to appeal the court's award of attorneys

fees. Courts must be wary of orders, even those which are well-meaning, that might impermissibly encumber the right of appeal in the federal scheme. *Id.*, at 718 (citations omitted).

Further, even the seeking of awards of such sanctions are clearly ongoing attempts by Union/Contractors Ass'n Defendants, acting here in their dual roles as ERISA trustees, to execute an end-around the American Rule and stated intents of Congress, in passing both the Labor Management Relations Act and the Labor-Management Reporting and Disclosure Act, to ensure the citizens who unknowingly forfeit many rights as third party beneficiaries to collective bargaining agreements, and as union members, are not made economic victims of national labor policy. *Cf. Atkinson v. Sinclair Refining Company*, 370 U.S. 238, 82 S.Ct. 1318, 8 L.Ed.2d 462 (1962).

CONCLUSION

Exceptional circumstances, amounting to a judicial usurpation of power, justify reversing circuit court dismissal of Plaintiff's appeal and district court imposition of that exorbitant $2,000.00 bond, and if the two courts continue to insist on such costs bonds as a condition of Plaintiff's appeals, the remainder of the then-existing original $1,000.00 bond for costs (plus interest), which the district court has disbursed to Defendants to partially pay the outrageous award of sanctions, should be ordered redeposited in the Federal Registry.

Dated: 4-09-1996 Lawrence Moore

Lawrence Moore

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EMPLOYEE RETIREMENT INCOME SECURITY ACT, Title I, § 3 (29 U.S.C. 1002)

DEFINITIONS

Sec. 3. For purposes of this title:

(5) The term "employer" means any person acting directly as an employer, or indirectly in the interest of an employer, in relation to an employee benefit plan; and includes a group or association of employers acting for an employer in such capacity.

(7) The term "participant" means any employee or former employee of an employer, or any member or former member of an employee organization, who is or may become eligible to receive a benefit of any type from an employee benefit plan which covers employees of such employer or members of such organization, or whose beneficiaries may be eligible to receive any such benefit.

(14) The term "party in interest" means, as to an employee benefit plan - (C) an employer any of whose employees are covered by such plan.

LABOR-MANAGEMENT REPORTING AND DISCLOSURE ACT

TITLE V - SAFEGUARDS FOR LABOR ORGANIZATIONS (29 U.S.C. 501)

Fiduciary Responsibility of Officers of Labor Organizations

Sec. 501. (a) The officers, agents, shop stewards, and other representatives of a labor organization occupy positions of trust in relation to such organization and its members as a group. It is, therefore, the duty of each such person, taking into account the special problems and functions of a labor organization, to hold its money and property solely for the benefit of the organization and its members and to manage, invest, and expend the same in accordance with its constitution and bylaws and any

resolutions of the governing bodies adopted thereunder, to refrain from dealing with such organization as an adverse party or in behalf of an adverse party in any matter connected with his duties and from holding or acquiring any pecuniary or personal interest which conflicts with the interests of such organization, and to account to the organization for any profit received by him in whatever capacity in connection with transactions conducted by him or under his direction on behalf of the organization. A general exculpatory provision in the constitution and bylaws of such a labor organization or a general exculpatory resolution of a governing body purporting to relieve any such person of liability for breach of the duties declared by this section shall be void as against public policy.

(b) When any officer, agent, shop steward, or representative of any labor organization is alleged to have violated the duties declared in subsection (a) and the labor organization or its governing board or officers refuse or fail to sue or recover damages or secure an accounting or other appropriate relief within a reasonable time after being requested to do so by any member of the labor organization, such member may sue such officer, agent, shop steward, or representative in any district court of the United States or in any State court of competent jurisdiction to recover damages or secure an accounting or other appropriate relief for the benefit of the labor organization. No such proceeding shall be brought except upon leave of the court obtained upon verified application and for good cause shown which application may be made ex parte. The trial judge may allot a reasonable part of the recovery in any action under this subsection to pay the fees of counsel prosecuting the suit at the instance of the member of the labor organization and to compensate such member for any expenses necessarily paid or incurred by him in connection with the litigation.

(c) Any person who embezzles, steals, or unlawfully and willfully abstracts or converts to his own use, or the use of another, any of the moneys, funds, securities, property, or other assets of a labor organization of which he is an officer, or by which he is employed, directly or indirectly, shall be fined not more than $10,000.00 or imprisoned for not more than five years, or both.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

CASE NO. 87-0172-B

Findings of Fact and Conclusions of Law, Judgment on Court Trial and Judgment on Special Verdict

This case came on regularly for trial on July 16, 1991. Jury verdicts on bifurcated issues were returned on July 24, 1991 and August 22, 1991. Remaining non-jury issues were tried on January 28 and 29, 1992. Plaintiff appeared as his own attorney. Louis Levy, Esquire appeared for Defendant Local 569 and Terrence Yellig, Esquire appeared for Defendant IBEW.

. . .

[T]he jury returned answers to special questions covering all remaining jury trial causes of action not previously removed by pre-trial Orders of the Court as follows:

We, the Jury in the above-entitled action, find on each of the questions submitted to us, as follows:

. . .

Question No. 33.

Has plaintiff proved by clear and convincing evidence that any or all of the defendants violated their fiduciary duties toward Local 569 by overseeing, allowing, or ratifying pension contributions at the rate of 48 hours per week on behalf of all the full time paid officers and union staff employees of Local 569?

Please answer "Yes" or "No."

Answer: Yes .

Dated: 8/22/91 Earlene Abeson
FOREPERSON

With respect to the non-jury trial of the three remaining equitable issues, the Court now enters the following FINDINGS OF FACT AND CONCLUSIONS OF LAW:

. . .

NOW, THEREFORE, based on the Jury's Special Verdicts

and the Findings of Fact and Conclusions of Law by the Court, and the Court being fully advised in the premises, hereby enters the following:

JUDGMENT

. . .

8. Additionally, the Court enters Declaratory Judgment that defendants violated their fiduciary duties toward Local 569, IBEW by overseeing, allowing, or ratifying pension contributions at the rate of 48 hours per week on behalf of all the full time paid officers and union staff employees of Local 569. Court costs of suit are awarded to plaintiff on this claim.

. . .

Declaratory judgment shall be entered under the Fourth Cause of action against defendants Paul Blackwood, Wayne Lovin, Jim Westfall, Tom Pridemore, Joe Heisler, Dick Smith, Terry Godshalk, Keith Widdop, George England, Kris Hartnett, Don Withem, Steve Workman, Mike Reilly, John Simpson, Ray Altmeyer, Richard White, Jim Brandon, Sharon Hahn, Bob Riel, Jim Aylsworth and Charles Wilder, declaring that said defendants violated their fiduciary duties toward Local 569, IBEW, by overseeing, allowing or ratifying pension contributions at the rate of 48 hours per week on behalf of all the full time paid officers and union staff employees of Local 569, IBEW.

Costs of suit are awarded to plaintiff on this claim.

FILED MAR 18 1992 Rudi M. Brewster
DISTRICT COURT JUDGE

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

CASE NO. 91-1543-B

Transcript of Hearing on Motion to Dismiss
Before The Honorable Rudi M. Brewster
United States District Judge
SAN DIEGO, CALIFORNIA, MONDAY, APRIL 6, 1992
(Call to order of the Court)

MR. VAN DER NAT: Good morning, your Honor. My name is Ray Van Der Nat, V-A-N, space D-E-R, space, capital N-A-T. I'm representing a number of the Local Union and trustee Defendants.

MR. BROWN: Good morning, your Honor. Hillyer & Irwin by Craig Brown and Norman Allenby on behalf of Fishbach & Moore.

MR. MOORE: Lawrence Moore apparing for himself as Plaintiff.

THE COURT: Good morning, Counsel and good morning, Mr. Moore.

The Court has reviewed the moving and responding papers on this case, and I have reached the following conclusions based upon that review.

There are two claims in this complaint as to which the Court is willing to grant leave to the Plaintiff to amend.

The complaint is dismissed under 12(b)(6) in its entirety without leave to amend except for two claims, and those two claims as to which leave to amend is granted are as follows:

Number one, the attempted cause of action -- excuse me, let me correct that. There is one claim as to which the motion to dismiss is denied, and that is the claim in which Mr. Moore is suing on behalf of the Union and against the trusts who received contributions on behalf of Union officers for credits for over 40 hours per week.

The excess -- the complaint states a cause of action for return to the Union from the trusts of that excess amount of money with

interest to be redeposited to the Union treasury resulting from those transfers. The complaint states a cause of action for that. The motion to dismiss that cause of action is denied.

Now, the ones that -- the motion is dismiss but with leave to amend is the cause of action in which the Plaintiff alleges conclusorily that the trustees of the trusts have misappropriated and squandered trust assets by reason of letting consultant contracts to friends and otherwise made disbursements of expenses which were imprudent and unreasonable and presumably illegal from the fund to third parties.

This is alleged conduct by the trustees of the trust.

The complaint on those causes of action is conclusory, vague, ambiguous and general and not sufficiently factual, and the motion to dismiss that claim is granted with leave to amend. But there's nothing here which would require the Defendants to respond to those accusations.

MR. MOORE: That's the two causes of action, your Honor?

THE COURT: That's -- I don't know how many causes of action -- there is a lot of repetition in this complaint. It's repetitive.

I'm looking at, for example, the seventh cause of action.

MR. MOORE: I'll agree with that, your Honor. It's hard to tell --

THE COURT: I beg your pardon?

MR. MOORE: It's hard to tell where the allegations on the eighth cause of action leave off and the seventh cause of action begin.

THE COURT: The seventh cause of action alleges that the Defendants did not manage assets of the trust with prudence and interest of participants. That's not a sufficient allegation. That's totally insufficient.

Number 110 says, "Defendants have refused to supply Plaintiff with requested information." That doesn't state a cause of action. There's no allegation that they have a duty to supply Plaintiff with any information.

MR. MOORE: That's a part of the act, your Honor, and they have that duty. Do I have to really come in for an injunction now to try to get these guys to show me their financial reports so I can name the other trustees? That's part of the act and it's

black and white, and everybody knows it. That's their first duty under the act -- is to provide me with annual financial reports which they refuse to do.

I've asked them specifically in writing for the reports, and I found out I had a right to examine them in person, and I went down there in person, and they told me, no, they weren't going to let me see them because of --

THE COURT: Let me inquire of Mr. --

MR. KISSANE: Your Honor, is this a matter of testimony under oath here that we'll be allowed to cross examine? Matthew Kissane appearing on behalf of a number of Defendants, your Honor, that haven't already been named.

I know that the Court has had --

THE COURT: No, I understand your point. Let me just --

MR. KISSANE: I'm willing to listen to you, your Honor, instead of Mr. Moore.

THE COURT: I understand.

MR. KISSANE: Thank you.

THE COURT: Let me just ask Mr. Van Der Nat.

MR. VAN DER NAT: Yes, your HOnor.

THE COURT: Mr. Van Der Nat, does the law -- this is, I take it, ERISA law we're talking about?

MR. VAN DER NAT: Yes, your Honor. If you're going to be asking ERISA questions, though, I'm more of the labor attorney while Mr. Kissane is the ERISA attorney.

THE COURT: Okay. Well, then let me ask Mr. Kissane. Mr. Kissane, does the law require a fund to supply accounting information and annual reports to participants in the fund?

MR. KISSANE: Yes, based on one year's -- of reporting, and Mr. Moore has received what he is entitled to under law, ERISA Section 104(b), your Honor. That's the reference. He's been supplied that.

THE COURT: He alleges that he wants an accounting for all funds. Do you have to give him detailed accounting for these funds?

MR. KISSANE: I have given him what the law is --

THE COURT: My question is, do you have to do that?

MR. KISSANE: No. Not to the -- there are documents that you are required to give him -- some are annual reports. We've

given him a copy of -- with complete financial notes.

We have supplied Mr. Moore literally with documents approximating 12 inches high, more than he is entitled to under Section 104 of the Act.

The Act simply provides that a participant is entitled to certain financial information concerning the general status of the fund and certain information pertaining to his individual status as a participant.

That information is defined --

THE COURT: Is he entitled --

MR. kISSANE: Those documents are defined within the act itself. He has been provided with those documents. He is not allowed, howeer, your Honor, to completely inspect every single document known to man ever filed in a trust fund, and he's asked for records back 10 years. He is only entitled to one year back.

MR. MOORE: Can I clarify that, your Honor? I've asked -

THE COURT: One year back, so -- in other words, if he -- he's not -- there are two limitations. Number one, certain information only, and then only one year back.

MR. KISSANE: Yes.

THE COURT: As to that. So if he wants that certain information only but if he wants to go back more than one year, he can only go back one year?

MR. KISSANE: No, your Honor. He can -- he can -- let me sugest this, your Honor. Mr. Moore has been provided with the opportunity to go back five years -- not one, but five. He has been provided that, and he's been furnished one year without charge.

MR. MOORE: If he'll agree to that, we'll drop it. If he'll agree to that, your Honor, we'll drop it. I just want to see the trust -- the annual trust reports that are filed with the -- what are they -- 5500 reports that are filed by these trusts by law. That's all I want to inspect.

I want the names of the other trustees, the co-fiduciaries.

MR. KISSANE: These are matters of public record, your Honor, filed by the trust fund with the Department of Labor. These are matters of public record, if Mr. Moore would like to have them.

MR. MOORE: ERISA says they have to let me see them,

your Honor, and they refuse to let me see them because they know I just want the names of the other trustees right now.

THE COURT: Is the participant entitled under the law to know the names of the trustees of the fund?

MR. KISSANE: I will give him those names, your Honor.

THE COURT: Is the participant entitled under the law to know the names of the trustees of the fund?

MR. KISSANE: I will give him those names, your Honor.

THE COURT: Answer my question.

MR. KISSANE: The participant --

THE COURT: It's just a "Yes" or "No."

MR. KISSANE: The current trustees, Yes. Former trustees within the parameters that I've provided the Court, Yes. And I'm going one step beyond that, your Honor. I'll give him the names of anybody in the last 10 years if that's all he wants.

MR. MOORE: No problem.

THE COURT: This sounds to me like it's turning into a discovery session that the magistrate judge should be handling.

I appreciate your offer and I appreciate your acceptance of the offer. Now, let's get off it. I'm going to rule on these 12(b)(6) motions if I can, and send you all down for your discovery agreements, which I'm pleased to see, down to the magistrate. Who's the lucky magistrate judge in this case? M?

MR. MOORE: Magistrate McCue.

THE COURT: Okay. Now, the next --

MR. MOORE: So I can amend -- I can amend 7 and 8; is that correct, your Honor?

THE COURT: I'm sorry?

MR. MOORE: I can amend 7 and 8?

THE COURT: Yes. 7 and 8 is the same. What is that - another -

MR. MOORE: Those are the two trust ones. One is for fraud and one is for breach of fiduciary duty with fraud.

THE COURT: Well, these allegations are very, very vague. For example, it alleges that the Defendants have engaged the various trusts -- ". . .in prohibited agreements and transactions with parties in interest." I can't handle that. That's paragraph 118. That's extremely vague. I don't know what you're talking about. I'm not going to require the Defendants to answer that.

You've got to be specific.

What Defendants? You've sued a whole mess of Defendants. It can't be possible that they've all done this, and they -- and then you say they've engaged the various trusts and funds -- and I don't know which ones you're talking about, and then it says, "in prohibited agreements and transactions" and I don't know what those are, "with parties in interest," and I don't know who those are.

So that allegation is unworkable, and I'm not going to require the Defendants to respond to it.

MR. MOORE: That's a plain allegation under ERISA, your Honor. I don't know what to tell you.

THE COURT: You've got to flesh it out. Just giving me the statute isn't a way to plead the complaint. So I'm going to grant the motion to dismiss that. Unless you get specific, what they've done --

MR. MOORE: Okay. This is the stuff I'm amending, right? Okay.

THE COURT: That's right. That's your seventh cause of action.

You speak of prohibited property. Then you say, "The Defendant trust, the pension trust and health trust have continued to lease property from the training trust despite ERISA prohibitions of such dealings."

MR. MOORE: That's the prohibition -- the prohibition, the acts which I'm speaking about are between the pension trust and the training trust. Apparently the pension trust is financing this training trust, and it's a prohibited transaction under ERISA and they went -- they supposedly got an exemption for financing -- for the pension fund to finance this building for the training trust. But then they went back and got a second exemption which nobody knew about the first one, but I found out about it by reading an old report or something.

Then they went back and got a second one, and they've not notified any paticipants to give them an opportunity --

THE COURT: Oh, there's no allegation that that's required. I don't know that they have to notify all the participants every time they make a contract or lease. I mean, I don't visualize that as being what the ERISA law requires.

You have a pension trust which has millions of participants, and I don't think that the trustees have an obligation to send notices to millions of participants every time they enter into a lease or a contract or a consultant's agreement or buy a water cooler or a typewriter. I don't think they have to do that.

MR. MOORE: Well, we've only got 2,000 maximum and --

THE COURT: I don't care if you've got 20. I don't think they have the obligation to do it because the rule has to be the rule. It can't be dependent on how many participants in the plan.

MR. MOORE: Well, ERISA says plain and simple, they have to notify the participants and give them an opportunity to object, your Honor.

THE COURT: To what?

MR. MOORE: To any prohibited transaction that they apply for an exemption with.

THE COURT: You mean, if they get an exemption, they have to notify all Participants and say they're asking for an exemption?

MR. MOORE: That's correct. They have --

THE COURT: Is that the case, Mr. Kissane?

MR. KISSANE: I'm not prepared to respond to off-the-cuff pieces of allegation. Let me just ask this --

THE COURT: I'm just asking you, as a matter of law, is that correct?

MR. KISSANE: Let me say that I believe that Mr. Moore is incorrect in his position, your Honor.

MR. MOORE: Well, that's just name calling. He's not answering --

THE COURT: No, he's not name calling.

MR. MOORE: Well, what's the answer to the question, your Honor? I cited it in my --

THE COURT: Mr. Van Der Nat says that you're the trust fund expert. He's put you on the podium now. You have to sustain that position.

MR. KISSANE: Your Honor, I can't --

THE COURT: Do you have -- do you have under the law -- does the trustee -- does the plan have a duty under the law, whenever they get an exemption from a prohibited transaction so they can enter into this otherwise prohibited transaction -- do they

have to give notice to all participants?

MR. KISSANE: Your Honor, let me tell the Court --

THE COURT: Yes or no.

MR. KISSANE: I can't give you a "yes" or "no."

THE COURT: All right.

MR. KISSANE: That's asking me to answer --

THE COURT: Well, then I'll give you three choices: "Yes," "No," "I don't know." What's your answer?

MR. KISSANE: I'm not going to respond, your Honor, and I'll tell you why. If you don't allow me to give you a complete response, then I'm giving you a response that is misleading to this Court and I sure won't do this as an officer of this court. I'd be pleased to submit you a memo or a brief by 5:00 o'clock tonight on that issue, but you must allow me to answer it completely, and I know that your Honor has had a very long morning; I know staff has had a very long morning.

I would be pleased, your Honor, to either listen to the rest of your ruling this morning or to come back -- at 2:00 o'clock --

MR. MOORE: I can have a brief back by 5:00, your Honor.

MR. KISSANE: Excuse me, Mr. Moore.

THE COURT: I can't be. So -- all right. At any rate, here's another allegation. Defendants permitted two separate and different vesting periods: for five years and for ten years for different subgroups of participants in the pension trust. So what?

MR. MOORE: They can't do that, your Honor. Only -- you can only have -- that's not in the best interests of the participants, and the plan always has to be run in the interest of the participants.

Furthermore, it was hidden from most of the participants. It's a collusive arrangement, and all these --

THE COURT: Is there something illegal in having different vesting periods?

MR. MOORE: Yes, there is.

MR. KISSANE: It's specifically provided for in the law that non-bargaining people must, by Congress, have five-year vesting and bargaining people can have ten-year vesting. Congress set up the five and the ten. The trustees did not, your Honor.

MR. MOORE: Well --

MR. KISSANE: As a matter of law, he is simply mistaken.

THE COURT: Now, there's an allegation number 6: "Defendants did not defray unreasonable expenses while administering..."

MR. MOORE: Can I comment very quickly on what he just said, your Honor? He said they must provide a five-year --

THE COURT: As a minimum.

MR. MOORE: -- period, and he said, "we can provide a ten-year period for the other people." That's -- has nothing to do with what I'm alleging. I'm saying that, once they provide the five-year vesting period, which they must provide for the non-bargaining employees, that option has to be given to all participants; otherwise the other participants are being discriminated against. It's plain and simple. And not only that -

MR. KISSANE: Tell Congress that, Mr. Moore.

MR. MOORE: He's living in the cracks, like the rest of these guys.

THE COURT: Well, he's stating a law here. As I hear Mr. Moore saying, it must provide five but for certain employees --

MR. MOORE: Union employees, working men, they can do ten.

MR. KISSANE: No, no, no. Non-bargaining, your Honor. Now, let me just --

THE COURT: What is non-bargaining?

MR. KISSANE: Non-bargaining could --

MR. MOORE: Non-union.

. . .

THE COURT: There are further allegations: "Defendants did not defray unreasonable expenses while administering the trust." That's vague. There's got to be more detail than just an allegation that they didn't spend their expenses, that they didn't defray -- I don't think you even mean to say "defray."

MR. MOORE: What paragraph is that, your Honor?

THE COURT: Paragraph 116. I don't even think you mean to use the word "defray" at all. I mean, it's just vague and it's unintelligible.

Anyway, I'm granting the motion to dismiss the seventh and eight causes of action.

Now, with respect to Defendant Fishbach & Moore, no cause of action is stated against Fishbach & Moore. The only question

in my mind is why should there be leave to amend?

I understand your allegation that Fishbach & Moore paid money into trust funds for the accounts of certain employees and, if that be true, that can not have hurt the trusts. In fact, they could have too much money in there -- cannot hurt the trusts, and I don't think the Plaintiff has any standing to challenge the payment by Fishbach & Moore of money into the trust, if too much money was paid to the trusts.

On the other hand, if the trust made a sweetheart deal with Fishbach & Moore whereby they could pay less into the trusts on behalf of certain employees, then the trust is being injured an I could believe that the Plaintiff could have standing to sue in the name of the trust against Fishbach & Moore to make them put more money in.

But this complaint, as I read it, claims that Fishbach & Moore put too much money into the trust, and that doesn't state a cause of action.

MR. MOORE: Well, that isn't technically what it is. They put too much money into the trust on behalf of certain supervisory employees.

THE COURT: I understand that.

MR. MOORE: Now, just a second. Also, ERISA is very clear -- now, these guys pulled a fraud on the Court in the previous case by saying that severance pay could be deposited into ERISA, and I gave you authority in the JNOV after that they couldn't do that, and I was alleging that them padding that guy's pension was quid pro quo for them allowing those transfers to go on illegally bythat defense contract.

THE COURT: The transfers were litigated in the last lawsuit. They're not in this lawsuit.

MR. MOORE: Fine. That's fine. But what I'm saying now is that this employer has rewarded his supervisors -- used these trusts to reward his supervisors by giving them outrageous pensions in this pension trust. Therefore, the benefit of that trust is inuring to the employer, and that's illegal under ERISA and a breach of their fiduciary duty as parties in interest.

THE COURT: The trust hasn't been hurt. They've got more money than they deserve to get. That can't possibly hurt the trust.

MR. MOORE: Their supervisors are going to get a distorted payoff.

THE COURT: That's fine, but it isn't going to hurt the trust and it isn't going to hurt any other participants because --

MR. MOORE: It's going to hurt the participants for sure.

THE COURT: No, it isn't because they won't get any more money out than what has been put in in their names plus the interest that it's earned.

MR. MOORE: Let me state -- my objection is twofold --

THE COURT: It doesn't state a cause of action.

MR. MOORE: Okay. Do you understand that it's twofold? One, I'm saying that the contractor is getting -- using the trust to get a benefit to entice people into supervisory positions by giving them distorted pensions, and two, I'm saying that they're putting trust hours into the trust that are not pension credits for hours worked.

THE COURT: It doesn't state a cause of action.

MR. MOORE: Okay.

THE COURT: You don't have the standing to raise those.

So the complaint is dismissed --

MR. MOORE: And that's final, right? There's no leave to amend or anything on that one.

THE COURT: That's right. Fischbach & Moore is dismissed from this lawsuit with prejudice and without leave to amend.

MR. MOORE: From all three causes of action.

THE COURT: From all the causes of action. There's no cause of action stated nor can one be stated. It wouldn't be with prejudice, but it would be without leave to amend. Dismiss without leave to amend.

Now, the first cause of action -- that's the 101 of the LMRDA. The first cause of action -- all of the counts thereunder are dismissed without leave to amend. No cause of action is stated.

The second cause of action --

MR. MOORE: The first cause of action --

THE COURT: And all four counts. That's the LMRDA count.

MR. MOORE: That's without leave to amend?

THE COURT: That's correct. None of that conduct states

a cause of action. That's freedom of speech that's being exercised by the people at these meetings, and there isn't anything that's been mentioned in those causes of action that violates the Plaintiff's LMRDA rights.

MR. MOORE: Union officers are reading letters that contain physical threats against me and that's not a cause of action, your Honor?

THE COURT: It's not actionable. They haven't -- in the first place, you don't even allege that the Union officer read the letter. There was a letter by some other member of the Union. It wasn't a letter from a Union officer threatening you.

MR. MOORE: It was to the Union officers, and the Union officers read it from the podium.

THE COURT: They have a freedom of speech. They can read a letter from a member if they want to. There's no cause of action stated. I'm sorry.

This Court is not going to police the inside of that meeting. There's a certain abstention doctrine between the courts and the running of labor unions, and every time somebody stands up and says "hello" or "goodbye" to you, you sue them, and I don't have jurisdiction over that, and I'm dismissing the first cause of action without leave to amend -- all four counts. That's the end of it.

MR. MOORE: "Hello" or "goodbye" is significantly different than a threat to beat me up.

THE COURT: Never mind. You know what I'm saying --

MR. MOORE: I know --

THE COURT: Second cause of action is Section 609 of the LMRDA. That incorporates by reference the first cause of action which has just been dismissed. It's also dismissed without leave to amend.

MR. MOORE: That's all the Defendants, right?

THE COURT: All the Defendants. Well, it's only -- you name -- the second cause names IBEW, McCann, Robbins, the Local, Pridemore, simpson, Hartnet. That's all you name. There are more Defendants in the case than that -- about three times as many Defendants as that.

The second cause of action is dismissed without leave to amend.

The third cause of action is -- that doesn't state a cause of action, and it's dismissed. I can't tell that he can amend -- based on what I've seen here -- I understand what he's saying. What he's saying that they did, they have a legal right to do, so I don't know how he could amend to state a cause of action -- a third cause of action.

MR. MOORE: You've already ruled on that in a previous case and said it was okay.

THE COURT: Well, I hope so because it looks to me like it is okay.

MR. MOORE: It looks to me like you're wrong, your Honor, but -- I'm not arguing --

THE COURT: -- isn't that case on appeal?

MR. MOORE: I just volunteered the information that you made this decision before. You're right on that.

THE COURT: So the third cause of action is dismissed without leave to amend -- all counts.

The count 2 of the third cause of action also doesn't allege a cause of action because the IBEW constitution by its very terms, as to which this Court takes judicial notice of having been in evidence in a prior lawsuit, requires that any bylaw amendment which reduces dues must be approved by the IBEW and it wasn't, so it isn't, and there's no cause of action for refusing to approve.

Now, title 5 -- that's the same. It's just another way of reworking it. So the third cause of action is dismissed without leave to amend.

Now, the duty of fair representation. This count 1 does not state a cause of action. I've already ruled that Plaintiff does not have any standing to contest Fishbach & Moore paying more money into the trust on behalf of certain employees in the trust. It is not a matter which this Plaintiff has any standing on, so count 1 is dismissed.

Count 2 is res judicata. It says that -- this talks about the violation of the inside agreement with respect to transfer of employees. Let's see -- oh, this is where they allege that the plaintiff was removed from groups 1 and 2.

The Plaintiff, by reason of the last lawsuit, has been reinstated in groups 1 and 2 and he's recovered damages for removing him

from groups 1 and 2. This is barred by res judicata, and I'm not going to relitigate it. Count 2 is dismissed without leave to amend. Count 2 of the --

MR. MOORE: That's right, your Honor. That's not the cause of action here. The cause of action here is the same cause of action that you dismissed in the previous -- in the previous case for their interference with my complaints and mail to the Appeals Committee.

MR. KISSANE: Your Honor, if I may interrupt Mr. Moore, we have four attorneys wanting to listen to you and not to his argument --

THE COURT: All right --

MR. KISSANE: -- and colloquy with you.

THE COURT: Mr. Moore, that -- the whole matter about taking you off groups 1 and 2 -- that's been -- you've been awarded damages for that. I have reinstated you to group 1, and --

MR. MOORE: I'm not arguing --

THE COURT: -- I assume that you're back on group 1.

MR. MOORE: I'm not arguing with that.

THE COURT: Well, the cause of action is --

MR. MOORE: I'm merely saying this cause of action is for interference with my mail to the Appeals Committee.

THE COURT: Well --

MR. MOORE: Do you understand that?

THE COURT: It's over the dam. It's all prior to stuff that was before us in the last lawsuit -- or it should have been.

MR. MOORE: That's come up since, your Honor.

THE COURT: Since?

MR. MOORE: Right.

THE COURT: Well, you have no reason to go to the Appeals Committee on that because you got a judgment on that.

MR. MOORE: Sure, I do because they're telling all the members that I illegally got my journeyman wireman's ticket and that they went to the Appeals Committee and the Trial Board and got convictions against me, and that's why they expelled me from the Union because I'm not a journeyman wireman.

THE COURT: Now your gravamen is their statements to the Union -- from one Union member to another at the meeting. I'm

not going to get into that.

MR. MOORE: That's not -- I'm not asking you to.

THE COURT: I'm sorry.

MR. MOORE: So I wrote a letter in to the Appeals Committee and I asked them to --

THE COURT: Count 2 is dismissed without leave to amend. fifth cause of action -- I've already dealt with that.

MR. MOORE: Can I explain to you what happened first?

THE COURT: Fifth cause of action, dismissed without leave to amend. That's against Fishbach & Moore.

Sixth cause of action -- now, this is the -- (Pause.)

MR. MOORE: These are two guys you wouldn't let me add in the other case, and Webb and --

THE COURT: I'm going to sustain -- I can't tell that you can't amend because I can't tell from this what has happened.

MR. MOORE: It's the same thing -- taking extra hours that I got --

THE COURT: Okay. Well, that's -- you don't state a cause of action for this. You don't have any standing to state a cause of action for that.

MR. MOORE: This is the same -- this is the same thing I just got the other 22 guys for, your Honor. These are two guys that came on late in the game, and I -- they were under Smith's and Pridemore's regime, and they're also taking the extra pension credits.

THE COURT: Oh, you mean they're getting Union money sent in --

MR. MOORE: Right. Right. These are just Union officers that are stealing Union funds to buy these pensions, right, same as the other guys.

MR. KISSANE: That's res judicata, your Honor.

THE COURT: Well, if it's as to people that weren't sued before --

MR. KISSANE: He can't piecemeal his actions. He had discovery in the case as to records --

THE COURT: Well, if --

MR. KISSANE: Now, your Honor --

THE COURT: If there's a statute of limitations defense, that'd be another matter.

MR. KISSANE: Your Honor, what about his standing? What about the other -- the other reasons that you have denied this? You've got a seventh and eighth cause which addresses that issue. Let us just --

THE COURT: No, no. The seventh and eighth -- that's an allegation that Union trust fund money is being dissipated. In other words, it's a cause of action in which money won't go to the Plaintiff. It'll go to the -- it'll go back to the funds -- the trust funds. That's a derivative type of lawsuit.

I'm giving him leave to amend that cuasc of action; however, this is where he's claiming that the Union, Local 569 is overpaying the trust fund. Now, his standing on that is he's a member of the Union and Union funds are being dissipated. He does have standing to sue in the name of the Union -- sue the trust fund to get the money back into the Union.

MR. KISSANE: That's res judicata.

THE COURT: Not if these are different Plaintiffs.

MR. VAN DER NAT: Your Honor, but these are two different Defendants who Mr. Moore admitted were under Mr. Smith's regime which is more than three and less than six years ago and agents who were hired by Mr. Pridemore which took office about two years and six months ago.

So obviously they were there and he knew they were there during this last lawsuit, but he chose not to sue them then so he could sue them now.

MR. KISSANE: That's my point, your Honor.

MR. VAN DER NAT: They should have been added as additional Defendants.

MR. KISSANE: They were necessary parties back in the previous litigation.

THE COURT: No, they were not -- they're not necessary parties because they're just additional examples of the same thing which -- I agree with you they should have been sued, but they weren't and they weren't necessary parties under any legal definition of that term. You cannot --

MR. KISSANE: You cannot bring in those Defendants seriatim, Judge.

THE COURT: Stay on your podium, Mr. Kissane. Don't call them necessary parties --

MR. VAN DER NAT: The problem is, your Honor, we can't allow 16 different lawsuits for 16 different employees. First one is dismissed; we file the third. You either throw everybody into the pot together or, if you don't throw them into the pot, they're out of the pot.

THE COURT: Well, if they're connected by some kind of a joint several relationship, I would agree with you.

However, If they're separate torts, then they run on their own independent statutes of limitation and, while I don't like seriatim suits any more than you, believe me, under the law, there's no way that I can force him to sue every Defendant in sight for unrelated transactions, and there's no connection between any one of them being over-deducted. There's no connection.

MR. VAN DER NAT: The connection is that, when the trust fund contributions were made on behalf of the other Defendants which were already litigated, trust fund contributions were made on these Defendants on the same form at the same time during the same period of time.

THE COURT: I know, but they're different people. I mean, they're severable and if the Defendants were aware that there were others that were in the same boat, I suppose it was common for them to tell the Court, "Hey, we should have a couple more Defendants here."

MR. MOORE: In fact, I tried to add them when I found out at the end, and they strenously objected and said I'd have to file another lawsuit. I said, "I've got to file another lawsuit for these guys?"

THE COURT: That's possible. I have no memory one way or the other on that. I'm not going to say that you're right or wrong. You're probably right, but I don't recall.

MR. MOORE: Thank you, your Honor.

THE COURT: I don't recall. The sixth cause of action -- this is against -- well, wait a second -- Mr. Pridemore was a Defendant on this. So was Mr. Heisler and so was Mr. Smith.

MR. MOORE: That's right.

THE COURT: Well, so why are they in here?

MR. MOORE: Mr. Archer, the Defendant --

THE COURT: Archer and Webb are names I don't recognize but --

MR. MOORE: Right. Those are the two guys that I found out about later.

THE COURT: So why are you suing Mr. Pridemore, Mr. Heisler and Mr. Smith?

MR. MOORE: Archer maintains that he didn't put money in there, that Pridemore put the money in there for him. Heisler signed -- Heisler and the other guy signed the checks for Archer.

So Archer says they're putting it in for him, but he doesn't have any --

THE COURT: Well, that wouldn't be a defense to a -- it would not be a defense to a suit in the name of the union to get the money back.

MR. MOORE: Right.

THE COURT: That you don't need to sue Mr. Pridemore, Mr. Heisler and Mr. Smith because you can prove that they did it for these people, but that doesn't mean that they have to be defendants and it doesn't give Archer and Webb a defense at all.

If the money was improperly paid, I don't care if it was paid by President Bush.

MR. MOORE: I understand.

THE COURT: The money comes back.

MR. MOORE: I understand that, your Honor. My only problem here is that I didn't know that Pridemore, Heisler and Smith were giving this money to Webb and Archer until later.

THE COURT: But they didn't give the money to them. They gave the money to the trust on their behalf.

MR. MOORE: Right. So they're all --

THE COURT: The sixth cause of action is dismissed as to Pridemore, Heisler, and Smith only, and the cause of action is not dismissed -- the motion to dismiss it as to Archer and Webb is denied.

MR. MOORE: The money has to come back to the Union for Webb and Archer -- then Pridemore and Archer didn't do anything wrong in that?

THE COURT: I'm not saying they didn't do anything wrong, but you're telling me that what they did was they wrote the checks to transfer the money for Webb and Archer.

MR. MOORE: Right.

THE COURT: All we're saying is -- all I'm saying is you do

state a cause of action to get the money that was paid on behalf of Webb and Archer returned to the Union.

MR. MOORE: Right. But now did Heisler and Pridemore also breach their fiduciary duty by writing these checks for these guys? Obviously, the answer is "yes."

THE COURT: Well, this is a suit -- this is a suit brought on behalf of the Union.

MR. MOORE: Right.

THE COURT: And you're not going to collect damages against the Union or the trust for that conduct. You've already been -- you've already gotten damages against the Union and the Union -- the jury was told about conduct of Mr. Pridemore and Mr. Smith and Mr. Heisler, so they're out of here.

MR. MOORE: They're out of here on --

THE COURT: On the sixth cause of action.

MR. MOORE: They're -- my verdict against them was on unrelated causes of action -- the same thing, no doubt --

THE COURT: Look, I don't want to discuss it anymore.

MR. MOORE: Okay.

THE COURT: They're dismissed from the sixth cause of action, and I've already handled the seventh and the eighth.

MR. MOORE: Okay.

THE COURT: The ninth cause of action is intentional infliction of emotional distress. That doesn't state a cause of action. If it's an ERISA case, it's preempted by ERISA, and so the motion to dismiss that cause of action is granted.

And that's the end of the complaint. And we'll prepare the order.

MR. KISSANE: Your Honor, just a housekeeping matter, please.

THE COURT: Yes.

MR. KISSANE: The jury trial demand -- is that also stricken as to causes of action 7 and 8, the ERISA matters?

THE COURT: There's no jury allowed under an ERISA cause of action.

MR. KISSANE: That's right. So is that stricken without leave to amend?

THE COURT: As to those causes of action, it is.

MR. KISSANE: Yes, thank you, your Honor.

THE COURT: The only -- there would be a jury -- let's see -- there would be a jury on the derivative action against the trust on behalf of the Union to get the money back for Webb and Archer, and there would be a jury -- what other cause of action remains?

MR. MOORE: Fraud, your Honor --

MR. VAN DER NAT: The sixth cause of action against the two other individuals that were not sued last time was the only cause of action that remains so far, your FHonor.

THE COURT: That's the only one that remains.

MR. VAN DER NAT: Yes.

THE COURT: And there's a jury on that, and there would be no punitive damages allowed on that, either.

MR. MOORE: Well, the case law says different, your Honor, about the jury trial and -- I laid it out. I refuted their arguments. Now, I didn't make my whole entire argument in here, but I refuted their arguments. The cases they cited don't hold that. I'm entitled --

THE COURT: That's good enough. I'll write up the order, and that'll be the rulings.

. . .

(Proceedings concluded 12:45 p.m.)

I certify that the foregoing is a correct transcript from the electronic sound recording of the proceedings in the above-entitled matter.

Mary Lou Rohr 4-14-92
Transcriber

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

CASE NO. 91-1543-B

Order Granting in Part and Denying in Part Defendants' Motions to Dismiss

The above captioned matter came on regularly for hearing on April 6, 1992, before the Honorable Rudi M. Brewster. Plaintiff appeared propria persona; Norman R. Allenby, Esq., and Craig Brown, Esq., appeared for Defendant Fischbach & Moore, Inc.; Matthew Kissane, Esq., Melissa Cook, Esq., and Ray Van Der Nat, Esq., appeared for defendants. Upon consideration of the motions and oppositions, it is hereby ordered:

1. The First and Second Causes of Action are dismissed without leave to amend. The plaintiff's right to participate in Union meetings was adjudicated in the prior lawsuit, Civ. No. 87-0172. This court cannot police the speech that takes place or is not allowed at Union meetings. There are no allegations that the defendants' speech was defamatory and or unprotected by the First Amendment.

2. The Third Cause of Action is dismissed without leave to amend. The acts alleged in it are legal.

3. The Fourth Cause of Action is dismissed without leave to amend. The plaintiff lacks standing to assert a cause of action based upon an alleged inappropriate work tax as alleged in Count One. The facts in Count Two were litigated in the prior law suit. This count is barred by res judicata.

4. The Fifth Cause of Action is dismissed without leave to amend. The facts alleged in this action are barred by the statute of limitations. Labor Management Relations Act, 29 U.S.C. 302. Moreover, the plaintiff does not have the requisite standing to assert this claim.

5. The Sixth Cause of Action is dismissed without leave to amend for all defendants except Archer and Webb. All defendants, excluding Archer and Webb, were defendants in the prior lawsuit. The claim is barred by res judicata to them.

Defendants Archer and Webb were not parties in the earlier suit and the plaintiff has thirty days to amend the lawsuit as to them.

6. The Seventh and Eighth Causes of Action are dismissed with thirty days leave to amend. The plaintiff's allegations in these causes of action are vague, conclusory, and redundant and should be amended to state the facts clearly as to which defendants must respond.

7. The Ninth Cause of Action is preempted by the Employees Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1305 which bars pain and suffering claims, and is dismissed.

8. Plaintiff may not receive general or punitive damages and his jury demand on the Seventh and Eighth Causes of Action are stricken. Plaintiff is seeking general damages for "pain, suffering, shame, humiliation and mental anguish." The Ninth Circuit has held that emotional distress damages are not available under ERISA. Sokol v. Bernstein, 803 F.2d 532, 534 (9th Cir. 1986). Also, punitive damages may not be sought in ERISA suits. Arizona St. Carpenters Pension Tr. Fund v. Miller, 938 F.2d 1038, 1040 (9th Cir. 1991).

Lastly, a breach of fiduciary duty action is "within the exclusive jurisdiction of courts of equity." Local No. 391 v. Terry, 110 S.Ct. 1339, 1346 (1990). Thus plaintiff is not entitled to a jury trial on the Seventh and Eighth Causes of Action.

IT IS SO ORDERED.

FILED APR 6, 1992 RUDI M. BREWSTER
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

CASE NO. 91-1543-B

Order Granting in Part and Denying in Part Defendants' Motions to Dismiss *Nunc Pro Tunc*

The above captioned matter came on regularly for hearing on April 6, 1992, before the Honorable Rudi M. Brewster. Plaintiff appeared propria persona; Norman R. Allenby, Esq., and Craig Brown, Esq., appeared for Defendant Fischbach & Moore, Inc.; Matthew Kissane, Esq., Melissa Cook, Esq., and Ray Van Der Nat, Esq., appeared for defendants. Upon consideration of the motions and oppositions, it is hereby ordered:

1. The First and Second Causes of Action are dismissed without leave to amend. The plaintiff's right to participate in Union meetings was adjudicated in the prior lawsuit, Civ. No. 87-0172. This court cannot police the speech that takes place or is not allowed at Union meetings. There are no allegations that the defendants' speech was defamatory and or unprotected by the First Amendment.

2. The Third Cause of Action is dismissed without leave to amend. The acts alleged in it are legal.

3. The Fourth Cause of Action is dismissed without leave to amend. The plaintiff lacks standing to assert a cause of action based upon an alleged inappropriate work tax as alleged in Count One. The facts in Count Two were litigated in the prior law suit. This count is barred by res judicata.

4. The Fifth Cause of Action is dismissed without leave to amend. The facts alleged in this action are barred by the statute of limitations. Labor Management Relations Act, 29 U.S.C. 302. Moreover, the plaintiff does not have the requisite standing to assert this claim.

5. The Sixth Cause of Action is dismissed without leave to amend for all defendants except Archer and Webb. All defendants, excluding Archer and Webb, were defendants in the prior lawsuit. The claim is barred by res judicata to them.

Defendants Archer and Webb were not parties in the earlier suit and the plaintiff has thirty days to amend the lawsuit as to them.

6. The Seventh and Eighth Causes of Action are dismissed with thirty days leave to amend. The plaintiff's allegations in these causes of action are vague, conclusory, and redundant and should be amended to state the facts clearly as to which defendants must respond.

7. The Ninth Cause of Action is preempted by the Employees Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1305 which bars pain and suffering claims, and is dismissed.

8. Plaintiff may not receive general or punitive damages and his jury demand on the Seventh and Eighth Causes of Action are stricken. Plaintiff is seeking general damages for "pain, suffering, shame, humiliation and mental anguish." The Ninth Circuit has held that emotional distress damages are not available under ERISA. Sokol v. Bernstein, 803 F.2d 532, 534 (9th Cir. 1986). Also, punitive damages may not be sought in ERISA suits. Arizona St. Carpenters Pension Tr. Fund v. Miller, 938 F.2d 1038, 1040 (9th Cir. 1991).

Furthermore, a breach of fiduciary duty action is "within the exclusive jurisdiction of courts of equity." Local No. 391 v. Terry, 110 S.Ct. 1339, 1346 (1990). Thus plaintiff is not entitled to a jury trial on the Seventh and Eighth Causes of Action.

Lastly, Fischbach & Moore is dismissed from the action. Although it is named as a defendant in the Seventh and Eight Causes of Action, which allege Breach of Trust Agreement and Breach of Fiduciary Duty, Plaintiff cannot state a cause of action against Fischbach & Moore since it was an employer with no fiduciary duty to the Union.

IT IS SO ORDERED.

FILED APR 22, 1992 RUDI M. BREWSTER
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

CASE NO. 91-1543-B

Transcript of Proceedings Before
The Honorable Rudi M. Brewster
United States District Judge
SAN DIEGO, CALIFORNIA, MONDAY, AUGUST 24, 1991
(Call to order of the Court)

MR. MOORE: Lawrence Moore appearing for himself.

MR. VAN DER NAT: Ray Van Der Nat on behalf of Local 569 and certain other Defendants, your Honor.

MR. BROWN: Hillyer and Irwin by Craig Brown on behalf of Defendant Fischbach and Moore.

MR. KISSANE: Matthew Kissane and Melissa Cooke of our office, your Honor, for all of the named Defendants with the exception of those of Fischbach, Moore and the Local.

THE COURT: And Mr. Van Der Nat, you represent the Local, right?

MR. VAN DER NAT: Yes, your Honor.

THE COURT: And Mr. Kissane, you represent the trusts and the directors of the trust?

MR. KISSANE: That's correct, your Honor.

THE COURT: Thank you.

Good morning, Counsel. I've reviewed the voluminous moving and responding papers on these motions and I'm prepared to advise you of my preliminary conclusions. There may be some questions that I need responses to, but there are a number of motions, and taking them in -- in the -- in no particular order -- bit let me start with the request by the Plaintiff for reconsideration of the Court's prior order dealing with the original complaint that was on file.

First of all, that motion was filed untimely. It was filed about 100 days after the order was entered, and therefore, is not appropriate. Secondly, the motion did not contain any citation of any new or additional facts relative to the original complaint.

There were attachments and exhibits and a declaration by Mr. Moore reciting new events in the life and times of Mr. Moore against the Local, the trusts, the trustees, the IBEW and everybody else in the labor world. But those were subsequent events. They had nothing to do with the original complaint, and would not be reached by a motion to reconsider in any event.

So for that -- those reasons, the motion for reconsideration -- A, not timely filed, B, no new evidence of any kind in support of it -- just a regurgitation of the arguments that were previously made -- the motion for reconsideration is denied. And furthermore, because the motion was filed out of compliance with the Local rules both in terms of not being timely filed and in terms of not being supported by anything new, the Court awards costs and attorneys fees to the parties that are opposing that motion for reconsideration. And I want the attorneys to submit their costs and fees within five days to the Court, and to the Plaintiff, and they -- the costs and fees will be examined by the Court, and if objected to by the Plaintiff, the court will conduct a further hearing on the reasonableness of those costs and fees, and if in that further hearing, if the Court filds that the fees are unreasonable, the -- in other words, the Plaintiff's position is well taken but they were unreasonable, the amount of fees sought will be reduced to what is a reasonable fee, and then they will be further reduced by a Rule 11 sanction for the necessity of hearing the motion on fees.

I would suggest that if there is an agreement -- if there is a disagreement on fees, that parties go to the magistrate judge and try to get the amount of those fees handled by the magistrate judge so you don't come back up here. If you come back up here, if the Court finds the fees requested to be reasonable, the Court will increase those fees by the fees and costs incurred in bringing the follow-up hearing on the reasonableness of the fees and costs.

So if it has to be resolved in this court, it is going to be expensive for either side. So the motion for reconsideration is denied with costs and fees to the responding parties on the motion for reconsideration.

Now, just to review who those people are, one would be F&M, one would be the Local and one would be the trusts and

their directors. If I'm missing anybody, it would be anyone who was the defending party to the motion to reconsider.

All right, so far is that clear?

MR. VAN DER NAT: Yes, your Honor.

THE COURT: All right. Now then, the motion by the Plaintiff to amend -- well, before we get to that, then there were motions filed against the first amended complaint, which was of course filed by Mr. Moore. He was -- by this Court, he was allowed to amend two causes of action; the seventh and the eighth, and those were the causes of action against the trusts. All other causes of action were dismissed without leave to amend.

In the first amended complaint which was filed with the Plaintiff, there were then motions filed by the Defendants to dismiss the first amended complaint. The Plaintiff then filed a motion for leave to file a second amended complaint which has been filed, and we have a second one in which the Plaintiff wishes leave to file.

The logical order, I think, for handling these complaints -- I think would be to deal first with the -- with the first amended complaint, unless the Court is -- is to view the second amended complaint as subsuming the first amended complaint, and then the issue would be raised as to whether the Defendants' motions which are filed against the first amended complaint, should be deemed to have been filed against the second amended complaint, but they weren't drafted that way, and they may not meet the allegations. So I think the more orderly way to proceed would be to consider the Defendants' motions against the first amended complaint -- and the problem I have with that is, that if we do that, then that all could be mooted if the Court grants leave to file a second amended complaint. So either way, the Defendants have been caused a lot of expense in responding to the first amended complaint, if indeed that's not going to be the complaint that we have in front of the Court. So either way, whether I do it one way or the other, there's going to be a tremendous amount of spinning of wheels and lost time.

I've reviewed the second amended complaint. The second amended complaint is very conclusory, vague, and unintelligible. The Court, in considering to grant leave to file a second amended complaint, may and should consider the proposed second

amended complaint, because if the Court finds that the second amended complaint is ineffectual, the cases instruct the Court that it can and perhaps should deny leave to file the second amended complaint. Since I find that the second amended complaint is extremely vague and incomprehensible, and would be clearly subject to motions to dismiss it, or at least motions for more definite statement, the Court declines to allow the Plaintiff to file a second amended complaint -- at least not the one that's proposed. So leave to file the proposed second amended complaint is denied.

Now, that takes us back to the first amended complaint, and I have motions by the Defense to dismiss and for more definite statement of the first amended complaint. The Court finds the first amended complaint, which basically is a -- is a lawsuit now against the trusts and all of the directors of the trusts. It also has a cause of action in the first amended complaint -- it has a cause of action against the Local for crediting or for sending over to the trusts 2,500 hours of pension time for two employees -- Webb and Archer, I believe their names are.

The Court grants the motion to dismiss that cause of action insofar as it is purporting to be a cause of action against the trusts and the trusts' directors, because they were not the conveyors of the allegedly inappropriate credits. They were the recipients of it. Likewise, Webb and Archer were the beneficiaries of it and they are therefore not the transmitters of it. The transmitter -- I perhaps shouldn't use that term because that may be confusing -- because the Local has a newspaper called the Transmitter, and I don't mean to confuse this with that newspaper. Let me say the conveyor of the credits was the Local, and as to the Local, the cause of action -- the motion to dismiss the cause of action against the Local for sending inappropriately high credits for pension and trust credits based upon employment by the Local of -- of certain Local officers, that motion to dismiss is denied. It states a cause of action against the Local for sending over too many hours to the trust. But the cause of action does not state a cause of action against anybody else except the Local. So the motion to dismiss that cause of action is granted as to everybody but the Local, and as to the Local, it's denied.

MR. MOORE: That's a breach of fiduciary duty under Title 5 of LMRDA, your Honor -- against the two officers for taking the money from the Union. It has nothing to do with --

THE COURT: The two officers, Webb and Archer?

MR. MOORE: Right.

THE COURT: The -- the Local is the entity which conveyed the -- which conveyed the credits to the trust. Webb and Archer were officers of the Local, perhaps, but Webb and Archer didn't convey those credits. It was the Local Union. Webb and Archer weren't the president and the secretary of the Union, they were the -- they were the ones whose time got put on the books of the trust, as I understood it. Maybe I misunderstood it.

MR. MOORE: No, this is purely taking the money from the Union. Those individuals took the money from the Union to pay those benefits to the trust, but the money was taken from the Union, and it's purely a cause of action for breach of fiduciary duty by those two individuals. The same as the individuals did in the previous case.

THE COURT: Well, Mr. Van Der Nat, Webb and Archer were business representatives of the Union, were they not?

MR. VAN DER NAT: Correct.

THE COURT: And they were employed by the Union?

MR. VAN DER NAT: Correct.

THE COURT: And the Union sent --

MR. VAN DER NAT: Contributions on their behalf.

THE COURT: -- contributions on their behalf to the trust.

MR. VAN DER NAT: Correct.

THE COURT: The cause of action is against the Local Union because the theory is that the Union improperly sent too many credits to the trust to the benefit of Webb and Archer.

MR. VAN DER NAT: Correct.

THE COURT: It does not state a cause of action against Webb and Archer. They didn't send the credits over, the Union sent the credits over.

MR. VAN DER NAT: Correct.

THE COURT: Well, my -- my ruling stands. Now, with respect to the causes of action against --

MR. MOORE: Excuse me, your Honor, I don't want to belabor the point, but this is exactly the same cause of action that

I just got verdicts against the other officers for. Exactly the same. These are two individuals that you wouldn't let me --

THE COURT: You got a declaratory relief verdict -- as I recall, you got a declaratory relief judgment to the effect that the Union had sent -- improperly sent hours to the trust.

MR. MOORE: No.

THE COURT: That's what you got. You didn't get --

MR. MOORE: No, it's not. I got a declaratory relief --

THE COURT: You did not get a money judgment arising out of -- sending over credits. The jury was asked: Were too many hours sent over? They said yes. And -- and this Court entered as part of its judgment, a finding -- declaratory relief stating that the Union had sent too many credit hours. And that's the extent of what this Court decided in last trial.

MR. MOORE: No, no, it isn't, your Honor. I've got a breach of fiduciary duty judgment against all those officers in --

THE COURT: Not for that.

MR. MOORE: Yes, I do.

MR. VAN DER NAT: Your Honor, in regard to the Webb and Archer, I believe it was just an oversight on Mr. Moore's part to have included them as Defendants in the original claim as Mr. Moroe so stated the last time here. So all we have now is just two Defendants who are not included in the previous jury trial, being named parties as a result of the same transaction by the Local, and that is, submitting the increased contributions on their behalf.

THE COURT: I -- I believe -- I don't have those papers in front of me, but my recollection is that the officers of the Union who caused the credits to be sent over were found to have breached their fiduciary duty to the Union. Webb and Archer aren't officers of the Union who -- who cause that to happen. They were business representatives who benefitted from it.

MR. VAN DER NAT: Right.

THE COURT: My ruling stands. Now, let's get to the other causes of action. The causes of action against the Union -- excuse me, against the trust are totally conclusory and ambiguous and incomprehensible. For example, there are allegations that they didn't maximize the investment of the funds in the hands of the trust. There are allegations that -- that they employed friends

to work for the trusts. Allegations that they -- they didn't avoid excessive expenses in administering the trust. None of those allegations are -- they're like a cloud. You can -- you can't get your hands on them. There's nothing specific in the -- in the complaints which allege any improper conduct by any particular director, nor is there any allegation of any defalcation by any employee or director of the trust.

There is an allegation that the trust refinanced a building. That doesn't state a cause of action for impropriety. There's nothing shown in the complaint that tells the Court that it's illegal or improper for a trust to invest its money in real property, even if it's real property to be used by the Unions in their training classes and so forth. There's nothing improper there. So the first amended complaint fails to state facts sufficient against any trust and against any trustee. The only cause of action that is stated in the first amended complaint is the one cause of action against the Union only, and that's for transmitting excessive credits for hours spent by employees of the Union to the trust. That's the only cause of action which is stated in -- as to which motions to dismiss are denied. Every other cause of action in the first amended complaint is dismissed.

Now, because the Court cannot say that the Plaintiff is unable to state a cause of action against the trust -- because remember, he's just alleging a bunch of generalities which I can't say that there isn't any facts known to the Plaintiff as to some inappropriate conduct by any -- or one or more directors of the trust, or the trust themselves -- trustee -- directors of the trust or the trust themselves. I'm going to give the Plaintiff 30 days leave to amend his complaint, but I will just say that the -- the complaint -- if there's to be another complaint filed on this court number against the trust and the directors, it had better be -- had better have some facts on it, because that will take me to my next point, which I want to address before you speak to the Court, Mr. Kissane.

MR. KISSANE: Thank you, your Honor.

THE COURT: And that is this: The Court is going to require the Plaintiff, before any amended complaint is filed in this matter, and before the Plaintiff proceeds even on the cause of action as to which the motion to dismiss has been denied, then

on this first amended complaint or any successor thereto -- before any filing takes place, before any discovery takes place, before any further proceedings take place, this Court is going to require the Plaintiff to file a $200,000 bond with this Court to protect the Defendants from attorneys fees and costs against the trust or the directors or any of the Defendants other than the Local Union, as to whom the Plaintiff states a cause of action. But as to any other Defendant, the Plaintiff must post a $200,000 cash or corporate surety bond with the clerk of this court before there will be any further proceedings under this case against the Union, trusts -- the Union trusts -- not the Union, but the Union trusts, and the directors.

Furthermore, there will be no further action taken in this case until the Plaintiff pays the attorneys fees and costs which the Court is awarding out of the Plaintiff's motion for reconsideration. That isn't a bond situation, that is a payment situation, because those have been cost-incurred to date. And the Court declines to award costs and fees to the Defendants in -- in the motion to dismiss the first amended complaint. It's the motion for reconsideration only which is the subject of attorneys fees and costs, not attorneys fees and costs in connection with the Defendant's motion to dismiss the first amended complaint. It's as to the remainder of the case.

The motion for reconsideration is out of this case, and Mr. Moore must pay all of those costs and attorneys fees before there will be any further action in this case, plus -- plus, there must be a $200,000 cash or corporate surety bond filed to protect the trusts and the directors of the trust. And the reason for this is, that the trust is -- is in danger of being severely eroded by the expense of these lawsuits. This Court can so far see no merit whatsoever to the attack against trusts or the directors, and the Court is concerned that this -- that this endless litigation is going to not only dissipate, but could potentially destroy the trust, and that would cause very severe and irreparable injury to the beneficiaries of the trust who are depending on those trusts for their retirement. And for that reason, a bond is ordered.

If there comes a time during the -- during further handling of the case, if the Plaintiff posts a bond, when the attorneys fees and costs approach the $200,000 limit of the bond, the Court

invites Defendants to call that fact to the attention of the Court and the Court would make a decision at that time as to whether to increase the bond. That will depend upon the status of the case, it will depend upon the merits of the case, and all other factors. But no decision is made on that today.

MR. MOORE: Okay, so on the 30 days that I have to amend against the Union, that's no until I pay the costs of the attorneys fees that you awarded also?

THE COURT: And on -- and, the bond must be posted, unless -- unless the trust --

MR. MOORE: I'm not talking about the bond.

THE COURT: Let me finish. Unless the trusts and the directors are dismissed. The case goes forward only against the Local for the -- for the -- the credits into the accounts of the employees of the Union. That's the only case that can go forward without posting a $200,000 bond. If there is any other cause of action against any other Defendants, the bond must be posted --

MR. MOORE: So the case against the trust or the Local is a party in interest, or --

THE COURT: Against -- against trust -- against the trust and directors. No lawsuit against the trust and directors will go forward from this point forward without a prior filing of a $200,000 case or corporate surety bond. However, if the case proceeds only against the Local and only on the cause of action for the inappropriate transfer into the trust -- of these credits -- that lawsuit -- if that is the whole lawsuit, may proceed without the bond. But it must -- but it will not proceed until the costs have been paid under motion to reconsider. That is going to be the first order of business; pay those costs. That's to F&M and all the moving parties who -- who moved -- who opposed --

Let me put it this way: All parties who were impacted by the motion to reconsider. As I understand the motion to reconsider, it effects F&M, the Local, and certain named individual Defendants and -- and not the trusts. Because those -- those cause of action --

MR. MOORE: Right.

THE COURT: Dismissal was with leave to amend. It -- it really -- the motion to reconsider is only against those as to

whom the Court dismissed without leave to amend.

MR. MOORE: Okay, now what about if I show you the order from the other case that says I've got breach of fiduciary duty against those guys --

THE COURT: I found in declaratory relief that the Union breached fiduciary obligation to its members by transferring too many credits to the trust. I remember entering that. That was a declaratory relief. But no money flows from it; it was a declaratory relief, Mr. Moore. I simply declared what the facts were. But I -- and in fact, I even mentioned at the time, "They're either going to comply based upon the declaration of rights and liabilities and they're going to pull them back into the Union, or if they don't, they may be subject to suit for that." I don't know what they did. For all I know, they may have pulled them back. But if they didn't, then a lawsuit could be brought against them for ordering them to pull it back, and get the money out of the trust and back to the -- to the Local.

MR. MOORE: Well, let me -- let me repeat my question now, your Honor. If I show you in the order that I got a breach of fiduciary duty cause of action victory against them, then will you change your mind?

THE COURT: Against who?

MR. MOORE: Against the individuals who are taking the pension money at the Union. The officers who were taking the money. You can't say that the Union is separate and apart from the very officers that are funning the Union -- taking the money, and are also the trustees that are receiving the benefits of the trust, and that's exactly what's happening here. If -- if --

THE COURT: If you got a judgment, Mr. Moore -- if you got a judgment against officers for some certain of monies -- for transferring money -- if you got such a judgment, then this lawsuit would be barred, because you have a judgment which is a bar to another lawsuit. All you have to do is execute on the lawsuit. That's irrelevant. So if you're right, then you don't state a cause of action against the Locals here. Even against the Locals you don't state a cause of action. But the reason I -- the reason I held that you do state a cause of action against the Local is, it's my understanding in that judgment, that you did not get a judgment in behalf of the Local against anybody else to return

the money. All you got was a declaration by this Court that the money had been improperly sent over there.

MR. MOORE: And if that's not true, your Honor --

THE COURT: If it's not true, then you're out of court on this all together, because -- because then you have a judgment against the Local and you can levy execution on that.

MR. MOORE: Well, I'm out of court. There's no doubt about that this morning. Now, we're out of here -- that's for sure. That's settled. But I'm only trying to establish one thing here. When you're denying my first cause of action in the second amended complaint, that you approve for filing on May 20th, the first cause of action is against those individuals for breach of fiduciary duty by taking that money. And it's the same thing -- same --

THE COURT: When you say "taking the money," what do you man? Nobody took any money. They ordered money transferred from the Local to the trust; is that the money you're referring to? The money didn't go to any --

MR. MOORE: Right.

THE COURT: -- officer, did it? It went to the trusts; isn't that right?

MR. MOORE: It went to the officer's individual account at the trust.

THE COURT: Yeah. It went to the trust to be in the accounts, but sometime in the future, these officers would draw on their retirement.

MR. MOORE: Right.

THE COURT: Okay, I just wanted -- when you say they took the money, I want to make sure I understand what you're talking about.

MR. MOORE: Right. There's two -- they took the money from the Union and sent it to the trust.

THE COURT: Correct.

MR. MOORE: Okay. The same individuals who were the officers at the Union, are the trustees of the trust. Now, during the trial, you said, no, you weren't going to force them to apy the money back, because the money was down at the trust and it wasn't before you. So then I brought it before you, but I also brought the cause of action against the two individuals who had

been taking the money at the Union --

THE COURT: Which two? Webb and Archer?

MR. MOORE: Webb and Archer.

THE COURT: They're just two more employees who got their benefits increased at the trust, aren't they?

MR. MOORE: At the Union.

THE COURT: No, at the trust.

MR. MOORE: No, no, the Union decided they were going to take money from the Union's general fund --

THE COURT: Yes.

MR. MOORE: -- to buy these exorbitant pensions for these people.

THE COURT: Well, they took money out of the Union treasury and they sent it over to the trust and they told the trust, "Credit Mr. Webb and Mr. Archer as well as a bunch of other employees, with so many credit hours on their account."

MR. MOORE: Right.

THE COURT: That's what happened.

MR. MOORE: That's correct. And I said that was a breach of their fiduciary duty as Union officers.

THE COURT: Yeah, and I held --

MR. MOORE: And I --

THE COURT: -- it was, and I held that it was.

MR. VAN DER NAT: And the Court ordered that the Union cease and desist from engaging in that conduct, and so at this point in time, we will go ahead and inform the Court that we'll be filing a motion for summary judgment saying that there's no damages in this particular case, since the conduct has ceased since the Court ruled that the Union should cease in paying the additional contributions on behalf of all of its --

THE COURT: Well, the Court held that it was a violation of the fiduciary obligation of the Union and its officers to the membership in transferring those credits.

MR. MOORE: Correct.

THE COURT: That was a declaratory judgment. Now, if -- if the membership of the Union filed suit against the Local and ordered those in the Local to either get that money back from the trust or cough it up out of their own pockets and pay it back to the Union, that would be a slam dunk lawsuit against the Union

and the officers who caused the money to be transferred, wouldn't it?

MR. VAN DER NAT: Assuming it was timely and there were other administrative procedures that were complied with, yes.

THE COURT: The Union could avoid that by simply contacting the trust and reversing those entries and transferring the funds back to the general fund of the Local, couldn't they?

MR. VAN DER NAT: Yes.

MR. MOORE: They could have done that in --

THE COURT: So if the would do that, it would -- they would turn off the spigot on one of these causes of action that the Plaintiff has in this case.

MR. VAN DER NAT: The remaining cause of action would be null and void at that point in time as moot.

THE COURT: It would be moot.

MR. VAN DER NAT: Yes.

THE COURT: It would be mooted. You would have mooted it. So -- but you prefer to litigate rather than to moot it.

MR. VAN DER NAT: We haven't -- we haven't made that choice yet, your Honor.

THE COURT: Well, okay, it's your choice. But that's why the cause of action stated against the Local -- the cause of action stated against the Local and its officers of the Local who caused the money to be transferred to the Union -- to the trusts in excess of 40 hours. As I recall, it was 48 versus 40 -- it went over, so we're talking about eight hours per week per person, which went over. That's what we're talking about. Now --

MR. MOORE: It's bigger than that, your Honor.

THE COURT: -- in that cause of action I dealt -- it's stated against the Union and its officers -- the officers who did it, not officers who might be there today who didn't do it -- later officers who had no hand in it wouldn't be defendants.

MR. MOORE: But we don't know who's doing it and we don't know how much --

THE COURT: Well, we know who the president was during the dates that it was done, and -- and we know one other officer -- who writes the checks?

MR. VAN DER NAT: Generally they're signed by the -- by

the president and secretary/treasurer.

THE COURT: Okay, so they -- they would be the officers who would cause those payments to be made, and they would be the ones -- they would be the ones who would have a potential personal liability to the Union and the Union itself -- you can't have a liability to itself. I mean, the Union is really the -- it's like a shareholder derivative suit. It's a suit brought in the name -- by a member of the Union in -- in place of the Union to get back into the Union, money which was taken out of the Union's general fund. And so the Union wouldn't be liable for that. They're the victims. They're not the perpetrators. The Union is the victim. That trust fund is sort of an incidental beneficiary. They've got a windfall. They didn't cause it to happen, they just caught it. It came down to them and they caught it. But they haven't, so the cause of action is against those in the Union who caused the inappropriate transfers to be made, and -- and it would seem to me that if the Union doesn't wish to keep litigating against members of the Union, a simple way to stop it is to simply reverse those entries and get the money back into general fund and loop this cause of action all together.

MR. VAN DER NAT: Your Honor, in that regard then, could we possibly have a stay of this particular cause of action to give the Union 60 days to decide whether or not -- whether or not it wants to follow that course of action --

THE COURT: Well, they had the -- they've had a year. I mean, I entered this judgment -- when did I enter this judgment; April of '91 or --

MR. MOORE: August of '91.

THE COURT: So you've had a year --

MR. VAN DER NAT: At least for my own --

THE COURT: Mr. Van Der Nat, you've had a year.

MR. VAN DER NAT: The Court's thinking is very clear today --

THE COURT: Well, I thought the thinking was very clear then. I entered a declaratory relief judgment that the Union and its officers had violated their fiduciary obligation to the Union by transferring Union funds without proper appropriation.

MR. VAN DER NAT: But that one time, the only remedy was the cease and desist order, which the Union complied with.

THE COURT: You mean they're not doing it anymore?

MR. VAN DER NAT: No, your Honor.

THE COURT: WEll, then you've got to find that period of time when it was done.

MR. VAN DER NAT: That's why I say, now that we know that it is a viable cause of action --

THE COURT: I think based on what I said, Mr. Van Der Nat, it doesn't take a rocket scientist to evaluate what you should do on behalf of your client. Mr. Moore is going to have to pay costs and fees to the motion to reconsider which -- if there's any disagreement as to what those fees are going to be, it may require further hearings which may take a few days or weeks or months, and nothing's going to happen in this lawsuit in the meantime. And furthermore, there will be no further action in this lawsuit even if those costs are paid -- there still will be no further action in this lawsuit against anybody but the Local and its officers -- the ones who are involved in those transfers, without the prior posting of a $200,000 bond. So it's possible that you're going to have enough time if you simply walk out of here and start doing what the Union should have done a year ago.

MR. VAN DER NAT: Thank you, your Honor.

MR. MOORE: Your Honor, the motion to strike against Fischbach because they're not party -- and their reply was four days late?

THE COURT: Their reply was one day late, and the motion to reconsider is denied, as I said, and costs are rewarded to all resisting parties.

MR. KISSANE: Your Honor, if I may just address some housekeeping matters.

MR. MOORE: The motion to strike is denied?

THE COURT: The motion to strike -- the Defendant's motion to strike --

MR. MOORE: Plaintiff's motion to strike.

THE COURT: The Plaintiff's motion to strike the response by F&M?

MR. MOORE: Right, opposition by F&M.

THE COURT: It's -- it's academic, Mr. Moore. Even if I were to strike the response --

MR. MOORE: It's not academic if they're going to get attorneys fees for it.

THE COURT: WEll, it was filed one day late, and --

MR. MOORE: They had no business being in here. They weren't Defendants. They were out.

THE COURT: Oh, no, your motion to reconsider was against them as well.

MR. MOORE: That's right, but it was filed -- it was filed -- it was a motion against Fischbach.

THE COURT: Yeah, you wanted a motion to reconsider --

MR. MOORE: No, I didn't bring that cause of action against Fischbach again, this is a new cause of action I've got against Fischbach over this clause in the agreement --

THE COURT: I granted -- I granted a dismissal without leave to amend -- of that cause of action in your original complaint, and you asked for reconsideration of that, and that was a cause of action against F&M.

MR. MOORE: No, your Honor, that was never in the complaint before. I din't find out about it until they just started this attorneys fees thing. What I had against Fischbach & Moore before isn't even related to what's up now in this motion to --

THE COURT: Fischbach & Moore -- who's the Defendant in this lawsuit?

MR. BROWN: Yes, your Honor, that's right. We were the Defendant in the new lawsuit, and the Plaintiff is talking about a separate cause of action about attorneys fees. However, the motion that you've granted -- relief today -- is a motion within the points and authorities filed by the Plaintiff. So what we're talking about is -- is a motion to reconsider. You brought a motion to reconsider on -- on the issue that we were dismissed on before, and that's what you granted fees on.

MR. MOORE: No, I did not, your Honor.

THE COURT: In the first complaint in this case number which is 1543, wasn't that complaint -- didn't it name F&M?

MR. BROWN: Yes, it did.

THE COURT: And didn't F&M get dismissed without leave to amend?

MR. BROWN: That's right, your Honor.

THE COURT: I don't want to hear any more about this

motion to reconsider, Mr. Moore. I've made the ruling on that.

MR. MOORE: There was no motion to reconsider on F&M, your Honor, it's a motion to amend -- for leave to amend on F&M. They're not involved in a motion to reconsider.

MR. VAN DER NAT: Your Honor, if we look at Mr. Moore's motion for reconsideration, on page two, I will quote, "Plaintiff also requests reconsideration of dismissal of Fischbach and Moore Inc. from causes of action which alleged breaches of trust agreement and fiduciary duty." That is directly from Mr. Moore's motion for reconsideration.

THE COURT: I don't want to hear any more about the consideration. I made my ruling on that.

MR. KISSANE: Just some housekeeping matters, if I might, your Honor. As named Defendants in the case caption and in the -- the various counts before the Court, there is a Defendant which I represent called the Labor Management Cooperation Fund and there is also an entity called the National Electrical Contractors Association who have been named as either a sponsoring -- or part of the trust allegations. I just want to make sure that when the order comes out --

THE COURT: The motion to dismiss is based on 12(b)(6) -- is against all Defendants other than the Local and its officers.

MR. KISSANE: I'm talking that the bond also applies not only to the trustee but -- and your Honor --

THE COURT: Oh, I see what you mean. It applies to every Defendant except the Local and the officers in the Local who caused those payments to be made.

. . .

THE COURT: Now -- before any amended complaints are filed as to trusts or directors of trusts or employers associations or anybody else other than the -- the Local and its then in office directors or officers, no amendments until -- previously filed a cash or corporate surety bond for $200,000 with the clerk's office to -- and to the benefit of all Defendants to be joined other than the Local and the then officers, and only for that cause of action. A bond would apply to the Local and to those officers for any other causes of action.

MR. MOORE: One point, your Honor? Can I have -- make one point? Okay, now. Fischbach and Moore brought countless

motions to dismiss and for summary judgment, and each time -- and consideration, and each time they did it, I objected that they were untimely, and you said that didn't matter. Now suddenly this morning it matters on me, heavy duty.

THE COURT: I can't deal with that. I don't have the facts in front of me. All I'm trying to do is call each shot as accurately --

MR. MOORE: Would you like to see the transcript?

THE COURT: No, I -- I made my ruling. I made my ruling.

. . .

THE COURT: Court's in recess.

(Proceedings concluded.)

I certify that the foregoing is a correct transcript from the electronic sound recording of the proceedings in the above-entitled matter.

Rebecca Dudly 9-2-92
Transcriber

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

CASE NO. 91-1543-B

Order denying Plaintiff's motions for reconsideration; denying in part and granting in part Defendants' motion to dismiss; granting Defendants' motion for fees and costs; and staying case until Plaintiff posts a cost bond

The above captioned matter came on regularly for hearing on August 24, 1992, before the Honorable Rudi M. Brewster. Plaintiff appeared in propria persona; Ray Van Der Nat, Esq., Matthew Kissane, Esq. and Melissa Cook, Esq., appeared for defendant Trusts and Trust Directors; Craig Brown, Esq., appeared for Fischbach & Moore. Upon consideration of the Motions, their oppositions and oral argument, the court hereby orders:

1. Plaintiff's Motion to file the "Second Amended Complaint" (which is actually a third amended complaint) is denied. Plaintiff moved to amend further his second amended Complaint to allege that certain union members made defamatory statements against him. The court finds that the alleged defamatory statements, some of which took place while plaintiff campaigned to be elected Business Manager of the Local, are not defamatory. Causes of action based upon them would not withstand a Motion to dismiss and an amendment based on them would be futile. Futile amendments do not have to be permitted. Lockwood Foundation v. Evangelical Alliance Mission, 930 F.2d 764 (9th Cir. 1991).

Plaintiff also would like to amend his second amended complaint to allege that he was assaulted by an individual named Carl Burns. While plaintiff may be able to state a claim against Mr. Burns, the proposed amendment does not allege anything arising out of the events embraced in the second amended complaint. Therefore, the amendment shall not be permitted.

Plaintiff would also like to attack the validity of Section 1.06 of the Inside Agreement. If the claim was or should have been

adjudicated in a prior lawsuit, the claim is res judicata in this suit. Federated Dept. Stores v. Moitie, 452 U.S. 394 (1981). The plaintiff in this action is also the plaintiff in Case No. 87-0172. In that case, plaintiff unsuccessfully brought suit against Fischbach & Moore. This court has held that § 1.06 entitles the prevailing party, Fischbach & Moore to an award of fees. Plaintiff cannot now attack the validity of § 1.06.

2. Plaintiff's Motion for Reconsideration of the Court's April 8, 1992 order granting defendants' Motions to Dismiss is denied. Plaintiff's filing of the Motion for Reconsideration violates Local Rule 7.1. Plaintiff does not allege any new facts and circumstances, and he filed the Motion for Reconsideration approximately sixty days beyond the thirty day period within which such a motion may be made.

Because the Motion to Reconsider should not have been brought and unreasonably increased the defendants' costs, plaintiff must pay the attorneys' fees and costs incurred in opposing the Motion. The fees and costs incurred by all respondents to the Motion to Reconsider are to be paid. If the plaintiff and concerned respondents cannot agree as to the appropriate amount of fees or costs, a motion for said determination may be noticed before this Court. However, at that hearing the court will determine which party acted unreasonably and that party will have to pay the fees and costs of such hearing. All causes of action in this lawsuit are stayed until these costs and fees are paid in full.

3. Defendant's Motions to Dismiss as to the Second Amended Complaint are granted with thirty days leave to amend except for the cause of action against various officers of Local 569 who allegedly caused excess pension credit hours to be credited to the accounts of Local 569 employees and agents; however, as to that cause of action, the court orders plaintiff to refile in order to allege with particularity the facts comprising the claim, the names of the defendants being accused, and to state the years during which the alleged illegal contributions were made. Any such amendment is subject to the required prior compliance with paragraph two hereabove.

4. Pursuant to Fed.R.Civ.P. 11, this lawsuit, including discovery, is stayed as to all Trusts and Trust directors on all

causes of action except as to the cause of action asserted against the pertinent officers of Local 569 who caused the alleged excessive pension credits to be sent to the Union Trust on behalf of certain Union agents and employees until plaintiff posts a $200.000 cash or corporate surety bond to be used to pay said defendants' attorneys' fees in the event that plaintiff does not prevail in his claims against the Trusts and Trust directors and officers. The court finds that plaintiff has unreasonably and vexatiously multiplied the proceedings in this matter. In determining that plaintiff has been unreasonable and vexatious, the court considers the fact that this is the third suit against defendants alleging many of the same violations. The proceedings in each of the cases have been exceedingly voluminous and excessive. The court has also reviewed the complaints in this action twice and questions the merit of the lawsuit against the Trusts. Without this bond, the Trusts' beneficiaries have no assurance that the Trusts will not be jeopardized or bankrupted defending against a lawsuit from which the Trusts are likely to be exonerated. This bond is meant to ensure that the Trusts will be able to recover the costs and fees expended in their defense in the event that they prevail.

IT IS SO ORDERED.

FILED SEP 10, 1992 RUDI M. BREWSTER
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

CASE NO. 91-1543-B

Order granting Plaintiff's ex parte application for a final order and dismissing case in its entirety

The court has received plaintiff's ex parte application for a final order dismissing this case. Plaintiff's ex parte application is granted and this case is dismissed in its entirety with prejudice.

On August 24, 1992 Plaintiff's motions for leave to amend and for reconsideration of previous denial of leave to amend and defendants' motion to dismiss came on regularly for a hearing before the Honorable Rudi M. Brewster. All of plaintiff's motions were denied. Defendants' motion to dismiss the Second Amended Complaint was granted except as to the causes of action against various officers of Local 569 who allegedly caused excess pension credit hours to be credited to be credited to the accounts of Local 569 employees and agents. Plaintiff was also ordered to pay defendants' attorney fees incurred to oppose the motion to reconsider. Finally, the court stayed all aspects of this lawsuit pursuant to Fed.R.Civ.P. 11 as to all defendants except as to the cause of action asserted against the pertinent officers of Local 569 who caused the alleged excessive pension credits to be sent to the Union Trust on behalf of certain Union agents. Plaintiff would only be allowed to proceed with this lawsuit if he posted a $200,000 cash or corporate surety bond to be used to pay said defendants' attorney fees in the event that plaintiff did not prevail in his claims against the Trusts and Trust directors and officers.

Plaintiff has communicated to this court that he is unable to post $200,000 in cash or as a corporate surety bond as required by the August 24, 1992 order in order to proceed with this action. The parties have been unsuccessful in attempts to agree on the amounts of the attorney fees for opposing plaintiff's motion to reconsider. Plaintiff has made it known to the court that he is unable to pay any amount for attorneys fees that may

be awarded.

Because plaintiff has stated that he is unable to post the necessary bond before this court is willing to permit plaintiff to pursue this lawsuit and because he has stated that he is unable to pay any amount of attorneys fees to defendants, plaintiff's ex parte application for a final order is granted and this case is dismissed in its entirety.

IT IS SO ORDERED.

FILED DEC 21, 1992

RUDI M. BREWSTER
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

CASE NO. 91-1543-B

Order granting attorney fees and costs for $2201.00 to Defendant Fischbach & Moore

The motion for attorney fees noticed by defendant Fischbach & Moore before the Honorable Rudi M. Brewster for January 11, 1993 was considered by court on the motion papers and the record. No oral argument was heard. Plaintiff Fischbach & Moore's motion for reasonable attorney fees and costs is granted in the amount of $2201.00.

1. In the order filed September 10, 1992, the court awarded reasonable attorney fees to defendants for opposing plaintiff's motion for reconsideration. The parties were directed to meet and confer regarding the amount of reasonable attorney fees. However, in the event that the parties were unable to reach agreement, the parties were to notice a hearing before this court regarding the fee matter. At that time, the court would not only determine reasonable attorney fees and costs, but also award fees and costs for bringing the attorney fee motion before this court to the party that acted more reasonably during fee negotiations.

2. During the fee negotiations between Mr. Moore and counsel for Fischbach & Moore, Craig Brown, Brown reduced his request for fees twice and properly excluded from the fee request all time spent on matters other than the motion for reconsideration, such as time spent on the motion to amend. The court finds Fischbach & Moore's fee request for opposing plaintiff's August 24, 1992 motion for reconsideration and its actions during the negotiations reasonable.

3. The court finds plaintiff's offer of $275 in response to Fischbach's request and his later failure to appear before Magistrate McCue for a hearing on this matter unreasonable.

4. Accordingly, defendant Fischbach & Moore's request for attorney fees spent on opposing plaintiff's motion for reconsideration is granted in the amount of $1,276 (11.6 hours).

This amount takes into account an adjustment by court of defendant's request by $66.00 since it appears from the motion papers and in particular the Declaration by Mr. Brown that a $66.00 entry for 8/4/1992 appeared twice. See Declaration of Craig A. Brown in support of Motion to Determine Reasonable Attorneys' Fees at 6-7.

5. Furthermore, the court finds that Fischbach & Moore's fee request and actions during the negotiations was more reasonable than Mr. Moore's offer and actions. Fischbach & Moore is granted $800.00 (6.4 hours) attorney fees and costs for bringing this motion.

6. Fischbach & Moore is also awarded $125 for its time spent in its effort to resolve this matter before Judge McCue.

7. Fischbach & Moore's request for fees and costs for time spent negotiating with Mr. Moore and drafting billing time summaries is not proper under the September 10, 1992 order.

8. Fischbach & Moore is awarded a total sum of $2,201.00.

IT IS SO ORDERED.

FILED JAN 15, 1993 RUDI M. BREWSTER
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

CASE NO. 91-1543-B

Order remanding determination of attorney fees to Magistrate Judge; and denying motion for reconsideration of Final Order

The Motion for Determination of Reasonable Attorney Fees and for Reconsideration of the Final Order noticed by defendants IBEW Local 569, the Union Trusts, and employees before the Honorable Rudi M. Brewster for February 8, 1993 was considered by the court on the motion papers and the record. No oral argument was heard. Defendants' motion for a determination of reasonable attorney fees and costs is remanded to the Magistrate Judge. Defendants' Motion for Reconsideration of the Final Order, entered December 22, 1992, is denied.

There are conflicting declarations by the parties in regard to whether plaintiff Moore was properly noticed of the attorney fees determination hearing before Magistrate Judge McCue. The attorney fees motion is remanded to Judge McCue for a determination of which party acted less reasonably in this context and what amount of attorney fees and costs should be awarded to defendants in accordance with the September 9, 1992 order of this court.

Defendants' motion for reconsideration of the Final Order, entered December 22, 1992, is denied. Defendants did not file their motion until January 11, 1993, more than 10 days after judgment in this case was entered and after plaintiff filed his notice of appeal. It is therefore untimely.

IT IS SO ORDERED.

FILED FEB 12, 1993

RUDI M. BREWSTER
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

CASE NO. 91-1543-B

Order on Matter of Reasonableness of Attorneys Fees

This matter came on for hearing on April 5, 1993. Based on the pleadings, memoranda, declarations and oral argument of counsel, this Court determined that:

1. The efforts of the Defendants' attorneys in defending against Plaintiff's "Motion to Reconsider" were recognized by Judge Brewster as being worthy of a cost and fee award.

2. The amount of the award is governed by the Rule of Reason. The United States Courts are not concerned with time actually spent on a matter but rather with time reasonably expended.

3. The actual hours billed by defense counsel here are excessive. It was only necessary to remind the court of its prior ruling. More than that was not reasonably required.

4. Plaintiff must pay for time spent by defense counsel in attending a hearing that was not held.

This Court, therefore, concludes that the Plaintiff will be in compliance with Judge Brewster's order denying the Motion to Reconsider and awarding fees and costs to the defendants by tendering the sum of One Thousand and Five dollars ($1,005.00) plus an additional Two Hundred and Fifty dollars ($250.00) for not appearing at the November 30, 1992 hearing. This award is intended to satisfy the claims of all defense counsel and the matter of apportionment is left to them.

IT IS SO ORDERED.

FILED APRIL 27, 1993. HARRY R. McCUE
UNITED STATES MAGISTRATE

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

CASE NO. 91-1543-B

Order

Upon consideration of defendant Fischbach & Moore's ex parte Application for Clarification of the February 12, 1993 Order, the Application is granted. The February 12, 1993 Order remanded the issue of attorney fees to Magistrate Judge McCue only as to Union and the Trust Defendants. Defendant Fischbach & Moore's attorney fee request was already determined by this Court's January 15, 1993 Order. Therefore, Judge McCue's orders determining attorney fees following the remand do not apply to Fischbach & Moore.

Fischbach & Moore's further request for attorney fees is denied.

IT IS SO ORDERED.

FILED JUN 15, 1993

RUDI M. BREWSTER
UNITED STATES DISTRICT JUDGE

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

LAWRENCE MOORE, Plaintiff-Appellant,	) C.A. No. 93-55287
v.	) D.C. No. CV-91-1543-RMB
LOCAL UNION 569 OF THE INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS; SAN DIEGO ELECTRICAL PENSION TRUST; JOE HEISLER, et al.; TOM PRIDEMORE, Defendants-Appellees.	) MEMORANDUM*) Filed June 27, 1994

Appeal from the United States District Court for the Southern District of California Rudi M. Brewster, District Judge, Presiding

Submitted June 10, 1994**
Pasadena, California

Before: FARRIS, O'SCANNLAIN, and TROTT, Circuit Judges.

Lawrence Moore contends the district court erred in (1) dismissing without leave to amend the remainder of his First Amended Complaint;

* This disposition is not appropriate for publication and may not be cited to or by the courts of this Circuit except as provided by Ninth Circuit Rule 36-3.

** The panel finds this case appropriate for decision without oral argument. Fed. R. App. P. 34(a); 9th Cir. R. 34-4.

(2) requiring him to pay the defendants' attorneys' fees incurred in opposing Moore's motion for reconsideration before proceeding any further with his remaining causes of action; and (3) requiring him to post a $200,000 bond before proceeding any further with his causes of action against the Trust Funds. We dismiss the appeal.

I.

In general, a plaintiff may not appeal a voluntary dismissal. Wickland Oil Terminal v. Asarco, Inc., 792 F.2d 887, 893 (9th Cir. 1986), cert. denied, 484 U.S. 822 (1987); Unioil, Inc. v. E.F. Hutton & Co., Inc., 809 F.2d 548 (9th Cir. 1986); Seidman v. City of Beverly Hills, 785 F.2d 1447, 1448 (9th Cir. 1986) (per curiam). An exception to this general rule arises when a district court grants a voluntary dismissal as a means of expediting the review of a party's claim. United States v. Procter & Gamble, 356 U.S. 677, 680-81 (1958); Thomsen v. Cayser, 243 U.S. 66, 83 (1917). This exception "applies only if 'the only other route is a contempt judgment, and by taking a dismissal and appealing, the appellant avoids unseemly conflict with the District court over the contempt issue.'" Plasterers Local Union No. 346 v. Wyland Ent., Inc., 819 F.2d 217, 218 (9th Cir. 1987) (quoting 2 Federal Procedure, Lawyers Edition § 3:315 (1981)).

Because another route of appeal was available, we lack jurisdiction over Moore's appeal from the voluntary dismissal order. The district court's order of September 10, 1992 was immediately appealable as a collateral order because it (1) conclusively determined that a bond was required before the matter could proceed; (2) resolved an important issue separate from the merits; and (3) was effectively unreviewable on appeal from the final judgment because Moore claims he could not afford to post the bond. Riverhead Sav. Bank v. National Mortgage Equity Corp., 893 F.2d 1109, 1114 (9th Cir. 1990). Moore failed to file a notice of appeal within 30 days of September 10, 1992. Fed. R. App. P. 4. His appeal is dismissed.

II.

Pursuant to Section 502(g) of ERISA, the Trust Funds seek to recover the attorneys' fees they incurred in opposing this appeal.

29 U.S.C. § 1132(g). In determining whether attorneys' fees should be awarded to a party in an ERISA suit, we consider:

> (1) The degree of the opposing parties' culpability or bad faith; (2) the ability of the opposing parties to satisfy an award of fees; (3) whether an award of fees against the opposing parties would deter others from acting under similar circumstances; (4) whether the parties requesting the fees sought to benefit all participants and beneficiaries of an ERISA plan or to resolve a significant legal question regarding ERISA; and (5) the relative merits of the parties' positions.

Hummell v. S.E. Rykoff & Co., 634 F.2d 446, 453 (9th Cir. 1980); see also Sokol v. Bernstein, 812 F.2d 559, 560 (9th Cir. 1987) (applying Hummell to determine whether attorneys' fees should be awarded on appeal).

We usually are reluctant to award attorneys' fees against an ERISA plaintiff for fear of chilling meritorious claims. In Sokol, we noted that the Hummell "criteria often suggest that attorneys' fees should not be awarded against ERISA plaintiffs." 812 F.2d at 560. However, aside from Moore's limited ability to satisfy a fee award, the remaining factors favor granting the Trust Funds' request.

Moore filed complaints against the Trust funds that raised vague and conclusory allegations lacking in either fact or law. Cf. West Coast Theater Corp. v. City of Portland, 897 F.2d 1519, 1526-28 (9th Cir. 1990). His complaints repeated allegations that had been litigated in his earlier suits. Nothing in the record suggests that further opportunities to amend would have solved these problems. Lockman Foundation v. Evangelical Alliance Mission, 930 F.2d 764, 772 (9th Cir. 1991). In addition, the court found that Moore had "unreasonably and vexatiously multiplied the proceedings in this matter."

On this record sanctions are appropriate. The purpose of ERISA is to protect the beneficiaries of pension plans. Sokol, 812 F.2d at 560. This purpose is not served by allowing employee trust funds to be depleted in the defense of unreasonable and vexatious claims.

Although the district court required Moore to post a $1000

bond to cover the defendants' court costs, it did not make findings as to attorneys' fees. We remand for the limited purpose of allowing the district court to determine an appropriate attorneys' fee award for the Trust Funds. Perkins v. Standard Oil Co., 399 U.S. 222, 223 (1970).

DISMISSED and REMANDED for an award of attorney's fees.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

CASE NO. 91-1543-B

Transcript of Motion Hearing Before
The Honorable Rudi M. Brewster
United States District Judge
SAN DIEGO, CALIFORNIA, MONDAY, OCTOBER 3, 1994
(Call to order of the Court)

MS. COOK: Good morning, your Honor. Melissa Cook on behalf of San Diego Electrical Industry trust funds.

MR. KISSANE: Good morning, your Honor. I'm appearing with Ms. Cook, Matthew Kissane.

MR. MOORE: Lawrence Moore, appearing for himself, your Honor, and I'd like to make my usual objection to you hearing any matter concerning me and ask you to recuse yourself.

THE COURT: Yes, I'm aware of that. I have a request from both sides for the Court to recuse himself and I'm going to -- I guess it's masochistic on my part, but I'm going to decline the request to recuse. The reason is because these are pending cases. The cases have been pending in this court for years and the Court has no bias for or against any of the parties in this case. The Court has always, in these cases, attempted to iron out these legal issues to the best of the Court's ability. I have no animosity against Mr. Moore. I understand that he's filed a suit against me. That will work its course and I'm certainly able to handle these cases.

The Defendant's concern is they want to recuse me because they want to avoid Mr. Moore appealing whatever order they're going to get from the successor judge. It's a fantasy if you think that Mr. Moore is not going to appeal any order that any court gives you're smoking something because Mr. Moore will appeal. If he doesn't think it's correct, he will appeal it. He's going to use the judicial system. He's a citizen. He's entitled to do it and he's going to do it. I can guarantee you that unless he wins 100 percent of what he asks for, he will appeal, and it doesn't

matter who represents the Defendants in this case. If Chief Justice Renquist (phonetic) represented them, there would still be an appeal.

Right, Mr. Moore, if you didn't get what you wanted?

MR. MOORE: Probably doubly so if Renquist represented me, your Honor.

THE COURT: There you go. So I appreciate your interest in trying to quiet the matter, but changing judges isn't going to make a bit of difference.

Since I have no particular bias one way or the other in this case, and these are cases that are already filed -- the Court does not recuse -- that would be an easy device to get a change of judge. All you've got to do if you don't like the judge that's assigned is you file suit against the judge. Then the judge recuses on that case.

MR. MOORE: Well, how come it doesn't work for me, your Honor?

THE COURT: That's not done.

MR. MOORE: It's not working for me.

THE COURT: No, no, it did work for you, because you will recall, Mr. Moore, you did file a lawsuit against the Court and subsequent to the filing of that lawsuit you filed a new lawsuit against other defendants and it was low numbered to this Court because I had these other cases pending and I recused on that new case because of the fact that you had filed a lawsuit against the Court.

MR. MOORE: Would the Court mind if I --

THE COURT: So, in other words, I recuse on new cases, but on the cases that are already before the Court, there's no reason for the Court to recuse itself.

MR. MOORE: Would the Court mind if I submitted a copy of the suit against you and a copy of your order recusing yourself on one case as exhibits in this case?

THE COURT: Yeah, there's no necessity of that. Let's get on with the business at hand.

MR. MOORE: Well, I'd like to have it in the record, your Honor.

MR. KISSANE: Your Honor, for once, I would like to request that we proceed by the rules of the Court to hear a

motion and not the monologue of Mr. Moore.

THE COURT: Well, let's do the best we can. Let me proceed with the issues that are before us. You can sit, if you like, and you can stand, if you like.

MR. MOORE: Is there any way I can get a response on that?

THE COURT: Any court in the land would take judicial notice of cases that are on file. So, when it becomes necessary, just ask the Court to take judicial notice for whatever court it's important and then you can file it with that court.

It isn't important to this Court. It doesn't have an affect on my ruling at all. I'm aware that I've been sued. I was served with it. If you'll recall, I was personally served with it. So I'm aware of the suit.

MR. MOORE: Just trying to make the record, you Honor.

THE COURT: Well, you've made the record. All right, now, let's go. Case number 91-1543 --

MR. MOORE: I've got a motion to strike also, your Honor.

THE COURT: Yes, I'm aware of that.

MR. MOORE: I'd like to add the reply of the Defendants to that motion to strike because they served it late as usual.

MR. KISSANE: Your Honor --

THE COURT: No, motion is denied.

MR. KISSANE: -- may I once again request that we follow the rules? This is my motion, not Mr. Moore's motion.

THE COURT: I understand. Let's proceed. Here's my tentative conclusion from these motions.

First of all, we have a motion by Mr. Moore for the return to him of the balance between a $1,000 cost bond which he filed in connection with case number 91-1543, and the $93.72 of court costs on appeal which were awarded to the trust fund.

MR. MOORE: That's not before the Court, your Honor, and I'm going to object the Court exercising any jurisdiction over that thing, that bond. You don't have any jurisdiction over that and I'm going to object to the Court exercising any jurisdiction over it. that was an ex parte application for release of that money and that's all it was. The Court has no jurisdiction to hear that and I'm objecting completely.

THE COURT: Well, because you made the application to this Court, I have the authority to hear it and that's why I'm

going to hear it.

MR. MOORE: It was an application for release.

THE COURT: With respect -- let me continue. With respect to the $1,000 bond, the Court of Appeal has ordered costs to the trust funds of $93.72. Those costs are ordered paid out of the $1,000 bond forthwith.

Now, the next thing is, in the case number 91-1543 there is a writ of attachment filed by the trust funds arising out of its obtaining a judgment while the case went along for costs and attorneys fees, which was entered by this Court on December 15, 1993, in the amount of $1,255.

Now, this writ of attachment is a lien on the case number 91-1543 and it's a lien on any assets in the case. The cost bond of $1,000 is an asset of the Plaintiffs on file with the case and it is the finding of this Court that the writ of attachment is a proper writ which would attach to the balance of that $1,000 cost bond posted by the Plaintiff in the same case.

So, the Court would hold that that writ of attachment is a lien on the balance of that fund.

There's another writ of attachment on the same case, 91-1543, in favor of Fishback & Moore, which has been filed in this case for their judgment of attorney's fees and costs which was rendered on December 15, 1993, in the sum of $2,201.00. This is also a writ of attachment lien on any assets of the Plaintiffs which might be on file in this court and that would reach the $1,000 cost on file by Mr. Moore.

So those are two attachment liens which the Court holds are proper liens of attachment against the $1,000 cost bond.

Then, finally, we have before us this morning the Court of Appeal's order for this Court to determine attorney's fees to be awarded to the trust fund Defendants arising out of their costs in the action, including the appeal and anything subsequent to the appeal.

The amount of that is to be determined this morning and the amount that's determined by the Court would also become a lien on the cost bond posted by Mr. Moore because the Court will issue a judgment in favor of the trust funds for that sum; that is to say, they could be a lien if there is a writ of attachment filed on behalf of the trust funds in the case number 91-1543 for that

sum, whatever it turns out to be.

Now, all of those items would have top priority to the cost bond balance of $906.28. It appears to the Court that they should be pro-rated, that, in other words, you would add up the -- assuming the trust funds files a writ of attachment, then the writ of attachment for the fees to be determined by the Court this morning, plus the fees previously awarded by this Court to the trust fund, which is in the sum of $1,255, they would be added and then on -- the Court would then look at the Fishbach & Moore judgment of $2,201 and the pro-rate created by those two numbers would be pro-rated against the balance of the bond of $906.28.

Now, that obviously will not satisfy the writs of attachment of either Fishbach & Moore or the trust funds, but any unsatisfied amounts that are left would be general -- they would be general judgment creditors and they could be attaching creditors on any other assets of the Plaintiff, including whatever assets he has in case number 87-0172 in which he has recovered a judgment against other defendants and which has been affirmed by the Court of Appeal and is ready for a final disposition.

Now, as far as the trust fund attorney's fees are concerned, the Court notes in Mr. Moore's opposition that in one instance at least there was a miscalculation of some numbers. I think he called it a beneficial -- what did you call it?

MR. MOORE: Beneficial arithmetic.

THE COURT: Yes, beneficial arithmetic. I'm not sure -- although I looked at the work done and I compared the work done with the briefs filed, and with the files and pleadings in the case, I'm satisfied that I can make a decision as to the work that was done, but I did not get a calculator out and multiply point-whatever part of an hour times the billing rate to see whether there is any more beneficial arithmetic in the bill.

I don't know whether Mr. Moore did that or not, but I did not.

MR. MOORE: I did it on a lot of it, your Honor, but it comes down to the fact that even when they had an opportunity to certify those billing statements as true and correct in their reply, they didn't do it again.

THE COURT: Well, I'm satisfied that they did. There was

a declaration by Ms. Cook that those were -- that that is the bill for work done on the appeal and that is a declaration under penalty of perjury. So I can't agree with that position.

However, my first question then is, have the mathematics been checked?

MS. COOK: Yes, your Honor.

THE COURT: If the mathematics have been checked and the computer errors have been corrected -- there were a number of them corrected on the bills.

MS. COOK: Yes, there were.

THE COURT: I noticed there were a number of corrections on the computer printout.

MS. COOK: Yes, there were.

THE COURT: I am satisfied that having reviewed the work done in connection with the briefs filed and with all of the miscellaneous work in connection with the appeal, that the work done is just and reasonable with respect to the handling by the trust funds and I would also add to that sum the cost with regard to the preparation of this motion and for attending the hearing this morning.

Those matters should be added up and double checked against the arithmetic to make sure that the mathematics are correct and the Court would order -- would sign a judgment for attorney's fees to the trusts in that sum.

The Court would make a finding of fact that the sum is just and reasonable, provided that you can -- you didn't cover this in your declaration. Were the sums which you're seeking in this billing -- are those sums that the clients, the trust funds, have been billed for these services?

MS. COOK: Absolutely, your Honor.

THE COURT: So, in other words, you're not asking for anything from this Court in terms of a judgment that's higher or at a greater rate or in any way more than you have billed your clients for these services.

MS. COOK: No, sir, your Honor. These are the bills that go out to the clients and that they've paid -- paid our firm from.

THE COURT: So, having made that determination, the Court is under the understanding that the judgment that it enters is going to be a judgment for fees which will be restocked into the

assets of the Defendants' trusts.

MS. COOK: Absolutely, your Honor.

THE COURT: So what remains then is to determine the correct total and award that sum and I will sign judgment for it forthwith. So I would suggest that counsel prepare the judgment, do the arithmetic, and submit the judgment for signature by the Court.

Now, I would suggest -- what?

MS. COOK: I'm happy to do that, your Honor. Do I need to present it to Mr. Moore?

THE COURT: I want you to be able to certify that you have given a copy of your proposed judgment to Mr. Moore. You may not be able to do that today, but you should rendezvous with him. You should make an arrangement to give him a copy of your proposed judgment so that he would be kind enough to sign for receipt of it. Or, if he refuses, that you can certify that you gave him a copy of it on such a date and time.

MS. COOK: I certainly will.

THE COURT: And I would suggest that you not do it by mail.

MR. MOORE: I can represent to the Court that I will refuse to sign it, so it's just better to go ahead with the declaration.

THE COURT: Would you like a copy of it?

MR. MOORE: Sure.

THE COURT: Do you want her to just file it and mail a copy to you?

MR. MOORE: Yes, please.

THE COURT: Very well. Then you don't need to have it certified that he's seen it before you submit it to the Court. Just submit it with the Court and serve a copy of it by mail on him and certify to me with your certificate of service that you've mailed a copy to Mr. Moore.

MS. COOK: I will do that, your Honor.

MR. MOORE: Now, as to my two arguments, your Honor.

THE COURT: Just one second. I want to make sure I've covered the points that I need to cover.

With respect -- I'll make sure I've covered this business about the priority for the $906.28 balance in the cost bond. From the $1,000 will be deducted forthwith $93.72 and paid to the trusts.

The balance of $906.28 I've already ordered who's entitled to that. I'm going to -- there's another point that we have to figure in here. Just a second.

Oh, Fishbach & Moore filed a cost bill on the appeal but it was rejected by the Court of Appeal because it was not timely filed. So they will not have any cost of appeal coming out of the $906.28 because they were not approved for a cost bill from the Court of Appeal.

Now, the -- this portion of the disbursement, that is to say $906.28, that portion of the disbursement is an order of this Court which is appealable, an appealable order, and it's appealable with respect to the attorney's fees for the trusts which were ordered by the Court of Appeal to be approved by this Court. But they're -- I think the Plaintiff would have the right to appeal the amount of that fee to the Court of Appeal.

Therefore, I think that the disbursement of the $906.28 has to abide the statutory time in which Mr. Moore has the right to appeal the order with respect to disbursement of the cost bond of $1,000, the remainder of it, and the order awarding attorney's fees to the trust, which was an order by the Court of Appeal for this Court to do.

The amount of that, in my view, would be an appealable order, which Mr. Moore would have a right to appeal.

MS. COOK: I don't agree with that, your Honor.

THE COURT: I just want to say this. If Mr. Moore does appeal the amount of the award, obviously he runs the risk that the Court of Appeal will order costs and fees to the trust funds arising out of that appeal as well, and I'm sure Mr. Moroe, if he didn't ralize that before now, he has heard it from this Court now that he should be advised that that is a possibility. The Court of Appeal, if requested by the trusts, might award costs and fees to the trust in connection with the appeal of this Court granting attorney's fees.

Now, therefore, I think that with respect to appealing the order on the judgment for attorney's fees out of the appeal -- I'm not making a determination on this, but it's possible that the Plaintiff, in order to appeal that judgment, would have to post a bond for it.

MS. COOK: We will certainly be requesting one, your

Honor.

THE COURT: And that may be true. Without a bond, the only effect it would have would be it would not stay execution on the amount left in the bond, that $1,000 balance. That would be available unless there were an appeal bond posted by Mr. Moore to stop the execution. I'm not going to -- that's not a problem that I'm going to deal with now, but --

MS. COOK: I understand.

THE COURT: -- I'm more or less just cautioning -- I'm just advising Mr. Moore of that possibility. I'm not making a finding and I'm not entering an order with respect to that.

Finally, I would remind the parties of the hearing on February 6th, 1995 with respect to the motion by Fishbach & Moore to release funds in case number 87-0172 pursuant to Fishbach & Moore's writ of attachment. And there may be additional writs of attachment which have since been filed and of which I'm not aware, or future writs not yet filed, but which I may have to sort out on February 6th, 1995. But that's the next hearing in this court with respect to costs and fees and miscellaneous items in order to wrap up these pending cases that are still before this Court.

So, that will be the order of the Court.

MR. MOORE: So, did the Court consider my argument that the Appeals Court was misled by the final order of this Court in that I never sued the trusts before?

THE COURT: Yes.

MR. MOORE: And furthermore there was no --

THE COURT: I considered that, but I don't review the Court of Appeals. I've considered your argument. I don't find any merit in it whatsoever.

MR. MOORE: You say that I did sue the trusts before?

THE COURT: Your suit against the trusts was the suit that was on appeal by the trusts.

MR. MOORE: That's correct.

THE COURT: You appealed your voluntary dismissal of your suit against the trusts.

MR. MOORE: It wasn't a voluntary dismissal, your Honor.

THE COURT: The Court of Appeals regarded it as such.

MR. MOORE: The Court of Appeals has done that in

another case.

THE COURT: Well, I'm not the Supreme Court, Mr. Moore.

MR. MOORE: Well, why are you begging the question, your Honor?

THE COURT: You make those arguments to the Court of Appeal. I don't think they misinterpreted this case.

MR. MOORE: I'm perfectly capable of that. I'm just objecting to you begging that question.

THE COURT: I'm not begging any questions.

MR. MOORE: I'm asking you two specific things. Did you, by making this award, find that I had previously sued the trusts in other cases? And did you by making this award make the finding that you found in the case against the trust that my claims against the trust were frivolous and vexatious?

MR. KISSANE: Unless Mr. Moore has noticed your deposition, your Honor, I would request that you limit your comments so that he doesn't have more of a record to bring up.

THE COURT: I think I've covered the issues that are before me this morning. So that will conclude the matter. Thank you all for your input.

MS. COOK: Thank you, your Honor.

(Proceedings concluded)

I certify that the foregoing is a correct transcript from the electronic sound recording of these proceedings in the above-entitled matter.

Karen Johanson 11-17-94
Transcriber

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

CASE NO. 91-1543-B

Order Granting Trust Defendants' Motion for Reasonable Attorneys' Fees; Disbursing Partial Proceeds of Cost Bond and Judgment

On October 3, 1994, a hearing was held before the Honorable Rudi M. Brewster to determine the reasonableness of the Trust Defendants' attorneys' fees as awarded by the Court of Appeals and to determine disbursement of the proceeds of the cost bond posted by plaintiff on appeal. Lawrence Moore appeared for himself; Melissa W. Cook, Esq. and Mathew T. Kissane, Esq. appeared for the Trust Defendants. Upon consideration of the motion and oral argument thereon, the court hereby:

1. Grants Trust Defendants' Motion for Reasonable Attorneys' Fees and awards Trust Defendants their attorneys' fees as awarded by the Court of Appeals in the amount of $46, 429.75;

2. From the cost bond of $1,000.00 posted by plaintiff, orders that the following amounts be disbursed to the following parties:

a. $93.72 to the Trust Defendants for their costs incurred on appeal as awarded on Trust Defendants' Bill of Costs by the Ninth Circuit Court of Appeals;

b. As to the remaining balance of $906.28, the court orders the said sum to be held by the Clerk of the Court for further disposition in the hearing presently calendared for 10:30 a.m., February 6, 1995.

Plaintiff, both orally and in writing, renewed his motion for recusal on grounds of bias. Defendants joined in this motion out of concern that plaintiff would be more likely to appeal any forthcoming judgment if the motion for recusal were denied. The court hereby DENIES both motions for recusal. The court reiterates that it has no bias for or against plaintiff or any of the parties, nor is it aware of any other legal ground for recusal.

Moreover, the court does not regard putative protection from appeal as a legitimate basis on which to grant a motion for recusal.

IT IS SO ORDERED.

FILED OCT 17, 1994

RUDI M. BREWSTER
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

CASE NO. 91-1543-B

Order Fixing Security For Costs on Appeal; Staying Appeal Until Such Bond is Posted

The Court has received Trust Defendants' ex parte motion to fix security for costs on appeal. In addition, on February 13, 1995, the Court received a letter addressed to a law clerk from Lawrence Moore indicating a desire to oppose the motion to fix security for costs on appeal.

On June 27, 1994, the Ninth Circuit dismissed plaintiff Moore's appeal against the Trust Defendants and awarded the Trust Defendants their attorneys' fees for having to defend the appeal. The Ninth Circuit remanded the case to this Court for a determination of attorneys' fees. This Court awarded the Trust Defendants $46,429.75 for attorneys' fees. Moore now seeks to appeal this award to the Ninth Circuit. Moore has claimed that he has no assets. The Trust Defendants move this Court for an order fixing security for costs of this appeal.

Moore's February 13, 1995 letter indicates that Moore wishes to submit an opposition to the Trust Defendants' motion on the basis that Moore believes such security is unnecessary because Moore still has a $1,000.00 bond for costs on appeal on deposit with the Clerk of the Court, of which only $92.00 has been disbursed for the Trust Defendants' costs. While Moore is correct that the remainder of the $1,000.00 bond remains on deposit with the Clerk of the Court, that bond will soon be completely disbursed by Order of the Court in partial payment of the Trust Defendants' attorneys' fees incurred on the appeal for which the $1,000.00 cost bond was posted. This bond will therefore be insufficient to provide security for costs incurred by the Trust Defendants in Moore's current appeal.

The Court finds that an order fixing security for costs of the current appeal is warranted pursuant to Fed. R. App. p.7. The Court hereby ORDERS that plaintiff/appellant Moore is required

to post a cash or corporate surety bond in the amount of $2,000.00 as security for payment of the Trust Defendants' costs on appeal. In addition, the Court hereby ORDERS that Moore's appeal of this matter is stayed until such a bond is posted with the Court.

IT IS SO ORDERED.

FILED FEB 16, 1995

RUDI M. BREWSTER
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

CASE NO. 87-0172-B
CASE NO. 91-1543-B

Order Disbursing Funds

On February 6, 1995, and again on March 6, 1995, the above captioned matter came on regularly for hearing before the Honorable Rudi M. Brewster. Plaintiff Lawrence Moore did not appear at either hearing. On February 6, 1995, Steven Sayler, Esq. appeared on behalf of defendants Fischbach & Moore, Inc.; Matthew T. Kissane, Esq. and Melissa W. Cook, Esq. appeared on behalf of the defendant trusts; and Lewis N. Levy, Esq. appeared on behalf of defendant IBEW Local 569. On March 6, 1995, Steven Sayler, Esq. appeared on behalf of defendants Fischbach & Moore, Inc. and Matthew T. Kissane, Esq. appeared on behalf of the defendant trusts. No other appearances were made on March 6, 1995. After due consideration of all papers submitted in regard to the disbursement of funds in Civil Nos. 87-0172-B(AJB) and 91-1543-B(AJB) the Court has made the following findings:

. . .

In Civil No. 91-1543-B(AJB) Moore appealed an Order requiring Moore to post $200,000.00 bond before proceeding any further with his remaining causes of action against the Trust Defendants. The Court required Moore to post a $1,000.00 bond to cover costs on appeal. The Ninth Circuit dismissed the appeal and awarded the Trust Defendants $93.72 in costs plus attorneys' fees for the appeal. The Ninth Circuit remanded the case to this Court for the determination of attorneys' fees. After receiving written submissions and hearing oral argument, this Court approved an award of $46,429.75 in attorneys' fees on appeal. By requiring Moore to post $1,000.00 before pursuing his appeal, this Court meant to protect the Trust Defendants by securing all costs of appeal to which the Trust Defendants might be later entitled. The Court did not consider the possibility that attorneys' fees would be awarded when it set this bond.

However, since the Trust Defendants were awarded attorneys' fees for the appeal, the Court finds they are entitled to the remainder of the $1,000.00 bond which was posted to secure their costs as part satisfaction of their judgment for attorneys' fees on appeal. Therefore, the Trust Defendants are entitled to the entire bond of $1,000.00 plus accrued interest.

The Clerk of the Court shall file this Order in both Civil No. 87-0172 and Civil No. 91-1543.

IT IS SO ORDERED.

FILED MAR 9, 1995 RUDI M. BREWSTER
UNITED STATES DISTRICT JUDGE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

APPEAL NO. 95-55046 ORDER FILED MAR 23, 1995

The court is in receipt of appellant's request for a stay of the briefing schedule and the appellees' response. The request is granted; this appeal is stayed until the district court issues an order in response to appellant's objection to the February 16, 1995 order or until April 14, 1995, whichever comes first. Within 7 days from April 14, 1995, the appellant shall file a status report and motion for appropriate relief.

Failure to comply with this order will subject this appeal to dismissal. 9th Cir.R. 42-1. A new briefing schedule will be set upon receipt of appellant's response.

A copy of this order shall be forwarded to the district court clerk.

For the Court:
CATHY A. CATTERSON Lou Pearson
Clerk of the Court Deputy Clerk

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

APPEAL NO. 95-55046 ORDER FILED OCT 2, 1995

The district court has now issued an order in response to appellant's objection to the February 16, 1995 order.

Accordingly, the briefing schedule is as follows: the opening brief and excerpts of record are due October 30, 1995, the answering brief is due November 29, 1995, and the optional reply brief is due 14 days from service of the answering brief.

Failure to timely file the opening brief shall subject this appeal to dismissal without further notice. 9th Cir.R. 42-1.

For the Court:
CATHY A. CATTERSON
Clerk of the Court

Cathie A. Gottlieb
Deputy Clerk

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

APPEAL NO. 95-55046 ORDER FILED NOV 30, 1995

The court is in receipt of appellees' motion to vacate the order of October 2, 1995 or in the alternative for an extension of time to file the answering brief. To the extent appellees' motion requests an extension of time, the motion is granted as follows: This appeal is stayed pending resolution of appellees' motion to vacate the clerk's order of October 2, 1995.

For the Court:
CATHY A. CATTERSON
Clerk of the Court

Cathie Gottlieb
Deputy Clerk

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

APPEAL NO. 95-55046 ORDER FILED DEC 8, 1995

Before: Sneed, Circuit Judge

Appellant filed the notice of appeal on November 14, 1994 and the clerk set a briefing schedule. On February 16, 1995, the district court entered an order requiring appellant to post a bond as security for costs on appeal and staying the appeal pending payment of the bond. Appellant filed a motion for reconsideration of the district court motion. The clerk stayed the appeal pending resolution of the motion for reconsideration. On October 2, 1995, upon the district court's affirmance of its previous order, the clerk set a new briefing schedule. Appellees now move for reconsideration of the clerk's order.

Appellees have failed to cite any authority which gives the district court jurisdiction to stay an appeal pending before this court. The motion for reconsideration is therefore denied.

Within 14 days from the date of this order, appellant shall either post the bond and provide written verification that he has done so or show cause why this appeal should not be dismissed for lack of prosecution. Ninth Cir. R. 42-1. If appellant elects to show cause, appellees may reply within 7 days from service of the response.

The briefing schedule is stayed pending compliance with this order.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

APPEAL NO. 95-55046 ORDER FILED JAN 12, 1996

Before: Sneed, Hall, and Brunetti, Circuit Judges

The court has reviewed appellant's response to this court's order to show cause. Appellant's request to stay the district court's order requiring him to post bond for the costs of this appeal is denied. This appeal is dismissed. 9th Cir. R. 42-1; see this court's order of December 8, 1995.

A certified copy of this order served on the district court shall act as and for the mandate of this court. No motions for reconsideration, rehearing, clarification, stay of the mandate, or any other submissions shall be filed or entertained in this closed docket.